July 1977

Alaska Criminal Code Revision — Tentative Draft, Part 4: Conspiracy; Criminal Mischief; Business and Commercial Offenses; Escape and Related Offenses; Offenses Relating to Judicial and Other Proceedings; Obstruction of Public Administration; Prostitution; Gambling

Alaska Criminal Code Revision Subcommission

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Summary

The Alaska Criminal Code Revision Commission was established in 1975, and reestablished in June 1976 as a Subcommission of the newly formed Code Commission, with the responsibility to present a comprehensive revision of Alaska's criminal code for consideration by the Alaska State Legislature. Tentative Draft, Part 4, is composed of nine articles of the Revised Criminal Code: attempt and related offenses (part 2); arson, criminal mischief, and related offenses (part 2); business and commercial offenses; escape and related offenses; offenses relating to judicial and other proceedings; obstruction of public administration; general provisions; prostitution and related offenses; and gambling offenses. Commentary following each article is designed to aid the reader in analyzing the effect of the draft Revised Code on existing law and also provides a section-by-section analysis of each provision of the draft Revised Code. Appendices include derivations of each provision of the Code and amendments to the gambling provisions of Title 5 of the Alaska Statutes.

Additional information

As of 1975, Alaska's criminal laws were based primarily on Oregon criminal statutes as they existed at the close of the nineteenth century, with new statutes added and old statutes amended over the succeeding 75 years by Alaska territorial and state legislatures in a piecemeal approach to revision. This resulted in a criminal code containing outdated statutes, obsolete terminology, a number of overly specific statutes, a

haphazard approach to *mens rea* (the culpable mental state with which a defendant must perform an act in order to be convicted of a crime) and the lack of a coherent, rational sentencing structure.

The Alaska Criminal Code Revision Commission was established in 1975 with the responsibility to present a comprehensive revision of Alaska's criminal code for consideration by the Alaska State Legislature. (The Commission was reestablished in June 1976 as a Subcommission of the newly formed Code Commission.) Staff services for the Criminal Code Revision Commission and Criminal Code Revision Subcommission were provided by the Criminal Justice Center at University of Alaska, Anchorage (John Havelock, project executive director; Barry Jeffrey Stern, reporter/staff counsel; Sheila Gallagher, Reporter/Staff Counsel; and Peter Smith Ring, research director). The tentative draft proposed by the Criminal Code Revision Subcommission was substantially amended by the Alaska State Legislature prior to its approval as the Revised Alaska Criminal Code in June 1978 (effective January 1, 1980).

Related publications

Work of the Criminal Code Revision Commission and Criminal Code Revision Subcommission are contained in these volumes:

Alaska Criminal Code Revision: Preliminary Report by Criminal Code Revision Commission (1976)

Alaska Criminal Code Revision — Tentative Draft, Part 1: Offenses against the Person (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 2: General Principles of Criminal Liability; Parties to a Crime; Attempt; Solicitation; Justification; Robbery; Bribery; Perjury (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 3: Offenses against Property (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 4: Conspiracy; Criminal Mischief; Business and Commercial Offenses; Escape and Related Offenses; Offenses Relating to Judicial and Other Proceedings; Obstruction of Public Administration; Prostitution; Gambling (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 5: General Provisions; Justification; Responsibility; Bad Checks; Littering; Business and Commercial Offenses; Credit Card Offenses; Offenses against the Family; Abuse of Public Office; Offenses against Public Order; Miscellaneous Offenses; Weapons and Explosives (1978)

Alaska Criminal Code Revision — Tentative Draft, Part 6: Sentencing: Classification of Offenses Chart; Index to Tentative Draft, Parts 1-6 (1978)

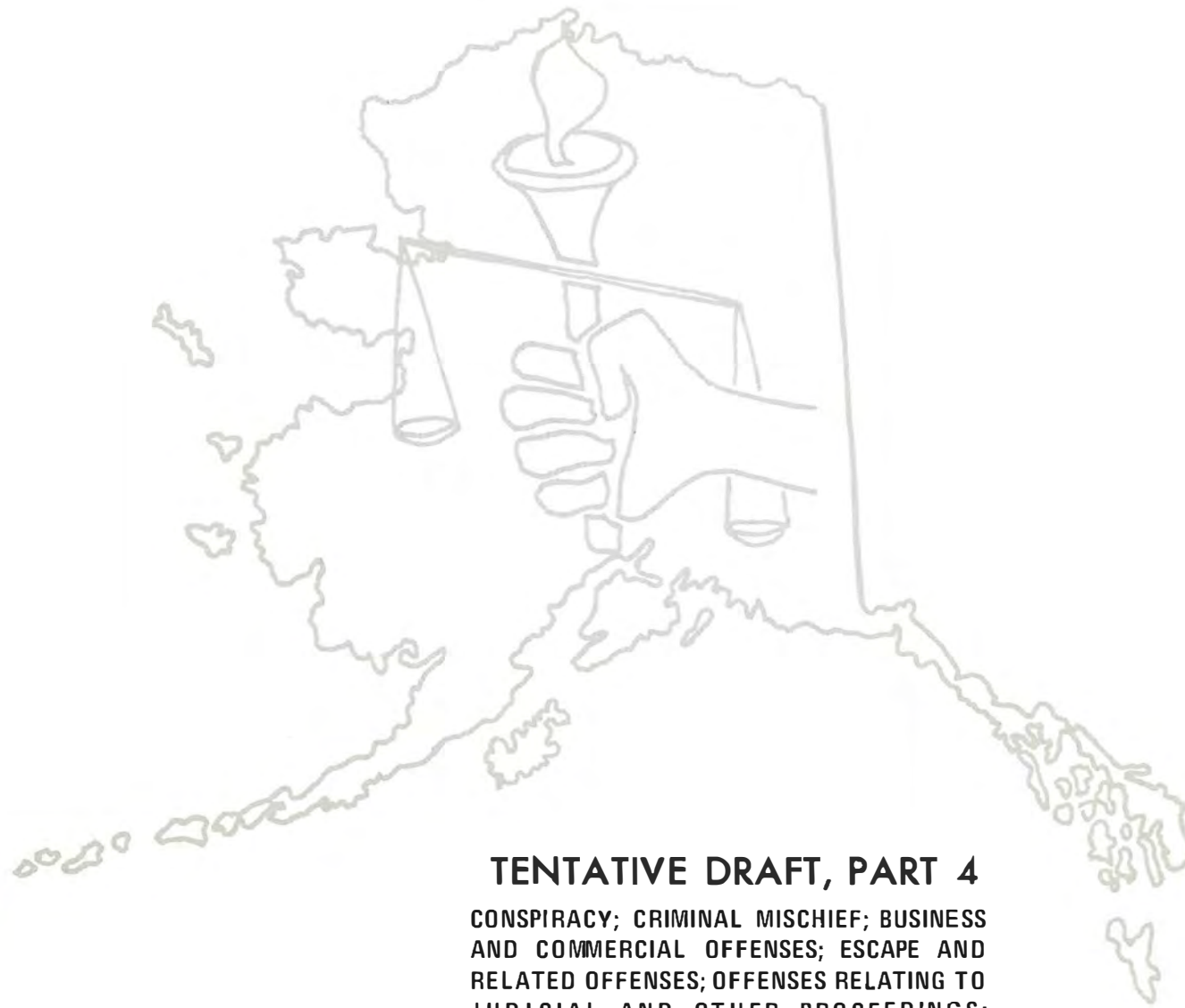
Commentary on the Alaska Revised Criminal Code (Ch. 166, SLA 1978) and Errata to the Commentary (1978)

Additional information about the criminal code revision can be found in the following articles by Subcommission's staff counsel:

Stern, Barry J. (1977). "The Proposed Alaska Revised Criminal Code." *UCLA-Alaska Law Review* 7(1): 1–74 (Fall 1977).

Stern, Barry J. (1978). "New Criminal Code Passes." *Alaska Justice Forum* 2(6): 1, 4–5 (Jul 1978).

ALASKA CRIMINAL CODE REVISION



TENTATIVE DRAFT, PART 4

CONSPIRACY; CRIMINAL MISCHIEF; BUSINESS AND COMMERCIAL OFFENSES; ESCAPE AND RELATED OFFENSES; OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS; OBSTRUCTION OF PUBLIC ADMINISTRATION; PROSTITUTION; GAMBLING

CRIMINAL CODE REVISION SUBCOMMISSION
HONORABLE TERRY GARDINER, CHAIRMAN
NOVEMBER 1977

ALASKA REVISED CRIMINAL CODE

Tentative Draft, Part 4

November, 1977

Honorable Terry Gardiner
Chairman

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INTRODUCTION TO TENTATIVE DRAFT, PART 4

Tentative Draft, Part 4, is composed of nine articles of the Revised Criminal Code - attempt and related offenses, part 2; arson, criminal mischief and related offenses, part 2; business and commercial offenses; escape and related offenses; offenses relating to judicial and other proceedings; obstruction of public administration; general provisions; prostitution and related offenses; and gambling offenses.

Tentative Draft, Part 3, was distributed in April and was composed of five articles in the Offenses Against Property chapter of the Revised Criminal Code - theft and related offenses, burglary and criminal trespass, arson and related offenses, forgery and related offenses and general provisions.

Tentative Draft, Part 2, was distributed in March and was comprised of seven articles of the Revised Criminal Code - general principles of criminal liability; partices to crime; justification; attempt and related offenses, part 1; robbery; bribery and related offenses and perjury and related offenses.

Tentative Draft, Part 1, was distributed in February and was comprised of four articles contained in the Offenses Against the Person chapter of the Revised Criminal Code - criminal homicide, assault and related offenses, kidnapping and related offenses and sexual offenses.

Commentary follows each article in the Tentative Draft and is designed to aid the reader in analyzing the

effect of the Revised Code on existing law. The Commentary also provides a section-by-section analysis of each provision of the Revised Code. All references in the Commentary to Tentative Draft provisions contain the letters TD before the usual AS cite.

The final part of the Tentative draft will be published in late December.

CHAPTER 31. ATTEMPT AND RELATED OFFENSES.

Section

Sec. 11.31.120. CONSPIRACY. (a) A person commits the crime of conspiracy if, with intent to promote or facilitate conduct constituting murder, arson in the first degree, kidnapping in any degree, extortion or a scheme to defraud in the first degree, he agrees with one or more persons to engage in or cause the performance of that conduct and he or one of those persons does an overt act in furtherance of the conspiracy.

(b) If a person commits the crime of conspiracy, as defined in (a) of this section, and knows that a person with whom he conspires to commit a crime has conspired or will conspire with another person or persons to commit the same crime, he is guilty of conspiring with that person or persons, whether or not he knows their identities, to commit that crime.

(c) In a prosecution under this section it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, gave timely warning to law enforcement authorities or otherwise made proper effort to prevent the commission of the crime that was the object of the conspiracy. Renunciation by one conspirator does not affect the liability of another conspirator who does not join in the renunciation.

(d) The liability of a conspirator for offenses committed in furtherance of the conspiracy, including a crime which is the object of the conspiracy, shall be determined by ch. 16 of this title.

(c) Conspiracy is a

(1) class A felony if the object of the conspiracy is murder;

(2) class B felony if the object of the conspiracy is arson in the first degree or kidnapping in any degree;

(3) class C felony if the object of the conspiracy is extortion or scheme to defraud in the first degree.

Sec. 11.30.125. DURATION OF CONSPIRACY FOR PURPOSES OF LIMITATIONS OF ACTIONS. (a) For purposes of applying the statutes governing limitations of actions in a prosecution under sec. 120 of this chapter, conspiracy is a continuing course of conduct which terminates

(1) when the crime or crimes which are its object are completed;

(2) when the agreement is abandoned by the defendant and by the person or persons with whom he agreed; or

(3) as to an individual defendant, when he abandons the agreement by advising the person or persons with whom he agreed of his abandonment or he informs law enforcement authorities of the existence of the conspiracy and of his participation in it.

(b) For purposes of (a)(2) of this section, abandonment is rebuttably presumed if neither the defendant nor anyone with whom he conspired does an overt act in furtherance of the conspiracy during the applicable period of limitations.

Sec. 11.31.130. DEFENSES TO SOLICITATION AND CONSPIRACY. (a) In a prosecution under sec. 110 or 120 of this chapter, it is not a defense

(1) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation or conspiracy; or

(2) that a person whom the defendant commands, solicits or conspires with could not be guilty of the crime that is the object of the solicitation or conspiracy because of

(A) lack of criminal responsibility or other legal incapacity or exemption;

(B) unawareness of the criminal nature of the conduct in question or of the criminal purpose of the defendant; or

(C) any other factor precluding the culpable mental state required for the commission of the crime.

(b) It is a defense to a prosecution under sec. 110 or 120 of this chapter that, if the criminal objective were achieved, the defendant would not be legally accountable under AS 11.16.120(a)(1) or (2) for the conduct of the person he commanded or solicited or the conduct of the person or persons with whom he conspired.

Sec. 11.31.140. MULTIPLE CONVICTIONS BARRED. (a) It is not a defense to a prosecution under sec. 100, 110 or 120 of this chapter that the crime that is the object of the attempt, solicitation or conspiracy was actually committed pursuant to the attempt, solicitation or conspiracy.

(b) A person may not be convicted of more than one crime defined by sec. 100, 110 or 120 of this chapter for conduct designed to commit or culminate in commission of the same crime.

(c) A person may not be convicted on the basis of the same course of conduct of both (1) a crime defined by sec. 100, 110 or 120 of this chapter; and (2) the crime that is the object of the attempt, solicitation or conspiracy.

(d) This section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime or crimes defined by sec. 100, 110 or 120 of this chapter and commission of the crime that is the object of the attempt, solicitation or conspiracy, provided that the penal conviction is consistent with (a), (b), and (c) of this section.

(e) If a person conspires to commit more than one crime listed in sec. 120 of this chapter, he commits only one crime of conspiracy so long as

the multiple crimes are the object of the same agreement.

ALASKA REVISED CRIMINAL CODE

CHAPTER 31. Attempt and Related Offenses (Part 2)

COMMENTARY

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.31.120. CONSPIRACY

A. Existing Law

A general conspiracy statute does not appear in existing law. With the exception of conspiracies to kidnap, AS 11.15.270, and "Conspiracies against rights of persons", AS 11.60.340, mere agreements to commit crimes, even if accompanied by an overt act toward the commission of the crime, are not criminal unless the conduct reaches the level of attempt or solicitation.

B. The Code Provision

The decision to include a limited conspiracy statute in the Revised Code was one of the most debated issues considered by the Subcommission. The conspiracy statute appearing in the Code is the most narrowly drafted of any state conspiracy statute. See generally Note, Conspiracy: Statutory Reform Since the Model Penal Code, 75 COLUM. L. REV. 1122 (1975). Conspiracy is limited to agreements to commit any of five crimes - murder (TD AS 11.41.110), arson in the first degree (TD AS 11.46.400), kidnapping in any degree (TD AS 11.41.300-.310), extortion (TD AS 11.46.195) and scheme to defraud in the first degree (TD AS 11.46.600). (It is likely that the proposed conspiracy statute will be amended after Dec. 10, 1977, to include the existing crime of "Conspiracies against rights of persons.")

In limiting conspiracy to agreements to commit five crimes, the Revised Code recognizes both the potential for abuse of a general conspiracy statute (see Johnson, The Unnecessary Crime of Conspiracy, 61 CAL. L. REV. 1137, (1973)) and the need to criminalize agreements to commit crimes involving serious danger to persons and aggravated economic offenses (see MODEL PENAL CODE § 5.03, Commentary at 96-101 (Tent. Draft No. 10, 1960). With the exception of scheme to defraud in the first degree (discussed in this Tentative Draft), the five crimes listed in the conspiracy statute have been examined in Parts 1 - 3 of the Tentative Draft. The reader is referred to those provisions for a discussion of the target crimes included in the proposed conspiracy statute.

1. Subsections (a) and (b) - Conspiracy; Conspiratorial Relationship

To commit conspiracy a person must act with an "intent to promote or facilitate conduct constituting murder, arson in the first degree, kidnapping in any degree, extortion or a scheme to defraud in the first degree." The intent requirement for conspiracy is similar to the culpable mental state requirement in TD AS 11.16.110, liability based on concuct of another: complicity. Acting with the requisite intent, the person must agree "with one or more persons to engage in or cause the performance" of conduct constituting that crime. In addition to the intent and the agreement requirements, proof that one of the parties committed an overt act in furtherance of the agreement must be established. Though some recently revised codes

have not included the "overt act" requirement (see, e.g., OR. REV. STAT. § 161.450 (1973); PROPOSED MICH. REV. CRIM. CODE § 1015 (1967)), the Subcommission concluded that this limiting element should be included in the statute. There is significant case law interpreting what conduct is sufficient to constitute an "overt act." See generally R. PERKINS, CRIMINAL LAW 616-18 (2d ed. 1969).

The issue of who is included in a conspiracy other than the defendant and the person he specifically agreed with is addressed in subsection (b) of the draft. Consider the case where John agrees with Steve to commit murder and Steve in turn hires Peter to commit the crime. In such a circumstance, is there a conspiracy among John, Steve and Peter or only individual conspiracies - John and Steve, and Steve and Peter? Subsection (b) provides that a conspiracy exists between all three if John knows that Steve will conspire with Peter to commit the offense.

The combined effects of subsections (a) and (b) are summarized in the Commentary to the Model Penal Code

> The Draft relies upon the combined operation of [TD AS 11.31.120(a)-(b)] to delineate the identity and scope of a conspiracy. All . . . provisions focus upon the culpability of the individual actor. [TD AS 11.31.120(a)-(b)] limit the scope of his conspiracy (a) in terms of its criminal objects, to those crimes which he had the purpose of promoting or facilitating and (b) in terms of parties, to those with whom he agreed, except where the same crime that he conspired to commit is, to his knowledge, also the object of a conspiracy between one of his co-conspirators and another person or persons."

MODEL PENAL CODE § 5.03 Commentary at 119-20 (Tent. Draft No. 10 1960).

2. Subsection (c) - Renunciation

Subsection (c) provides for the affirmative defense of renunciation to conspiracy. The defense parallels the defense set forth in TD AS 11.16.120(a)(3)(B) which allows for renunciation by accomplices. The reader is referred to Commentary accompanying Tentative Draft, Part 2 at 33-34 for a discussion of the requirements of this defense.

3. Subsection (d) - Accomplice Liability Based on Conspiracy

Subsection (d) follows the lead of the National Commission on Reform of Federal Criminal Laws in rejecting the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946), that mere membership in a conspiracy creates criminal liability for all offenses committed in furtherance of the conspiracy. National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code, Final Report § 1004(5), Comment at 72 (1971). To establish accomplice liability, the ordinary rules set forth in chapter 16, parties to a crime, must be satisfied. Mere participation in a conspiracy will not, in and of itself, be sufficient to establish complicity for the substantive offense if the conspiracy is successful.

II. TD AS 11.31.125. DURATION OF CONSPIRACY FOR PURPOSES OF LIMITATIONS OF ACTIONS

This section is derived from OR. REV. STAT. § 161. 465 (1973). The Commentary to the Oregon Revised Criminal Code, at 61, discusses the section:

This section provides that the conspiracy terminates for purposes of the statute of limitations as to all parties to the conspiracy when the object of the conspiracy, the crime, has been abandoned by all as evidenced by a lack of any overt act during the time limitation period. The conspiracy terminates for the purpose of time limitation for the individual conspirator if he expresses his wish to abandon either to his co-conspirators or if he tells the police of the existence of the conspiracy and his intention to abandon it. Note here that this does not necessarily constitute a renunciation as provided in [TD AS 11. 31.120(c)], supra. Abandonment starts the limitation statute running but is not otherwise a defense to a charge of conspiracy. . . . Subsection . . . [(a)(2)] of the draft, relating to abandonment by all the conspirators, represents the generally accepted view, according to the comments to the Model Penal Code section. With respect to subsection [(a)(3)], abandonment by the individual conspirator, the cases are fewer and the law less well settled. The major problem turns on what the individual is required to do before he can show he has abandoned. The choice of the Model Penal Code, as reflected in the draft section, seems reasonable. By requiring him to inform his co-conspirators of his intention to abandon the scheme, the policy goal is served whereby the co-conspirators may be discouraged and dissuaded by the announced defection. If the individual chooses instead to tell the police of his desire to abandon, it is obviously more likely that the conspiracy will be smashed before its criminal goal can be achieved.

Note that under subsection (b), abandonment of the conspiracy by all parties is rebuttably presumed if no party commits an overt act within the statutory time period following the initial agreement. This presumption may be overcome and continued vitality of the agreement shown by conduct not rising to the level of an overt act, i.e., constant and continued reference to the agreement by a participant.

III. TD AS 11.31.130. DEFENSES TO SOLICITATION AND CONSPIRACY

The statute specifically precludes two defenses to conspiracy and solicitation and recognizes one defense to those crimes.

1. Subsection (a)(1)

This subsection is the counterpart of TD AS 11.16 .120(b)(2), Exemptions to criminal liability for conduct of another (discussed in Tentative Draft, Part 2 at 35). Like that provision, it is based on the generally accepted principle that a person who is not capable in his individual capacity of committing a crime may nevertheless be liable for conduct of another that constitutes an offense.

2. Subsection (a)(2)

This subsection parallels TD AS 11.16.120(b)(3) (discussed in Tentative Draft, Part 2 at 35). The following commentary, taken from the Proposed Michigan Revised Criminal Code, examines the effect of this subsection.

> The provision is based on the universally acknowledged principle that one is no less guilty of a crime because he uses or attempts to use the overt behavior of an innocent or irresponsible agent. The only special problem presented here concerns the situation in which there are two parties to the agreement and one is immune from criminal responsibility for any of the reasons listed in the subsection. Although there are no Michigan decisions on point, decisions in other jurisdictions have held that there can be no conspiracy in such situations because a conspiracy, as an agreement of two or more persons, requires at least two guilty conspirators (citations omitted). It is suggested that the danger of the

> conspiracy arising from the prospective joint action remains essentially the same whether or not one of the conspirators is immune from prosecution. Moreover, the major basis for imposing liability in the area of inchoate crimes, the unequivocal evidence of a firm purpose to commit a crime, is present irrespective of the co-conspirator's innocence or immunity.

PROPOSED MICH. REV. CRIM. CODE § 1015, Commentary at 102 (Final Draft, 1967).

3. Subsection (b)

This provision is a counterpart to TD AS 11.16 .120(a) (discussed in Tentative Draft, Part 2 at 32). The subsection is designed to insure that a person who would not be criminally liable as an accomplice if a crime was completed will not be liable for solicitation or conspiracy when the crime is not completed.

TD AS 11.16.120(a)(1) provides that a victim of a crime, e.g., the fifteen-year-old in statutory rape, is not liable as an accomplice to the crime even if he or she solicited the commission of the crime. Similarly, TD AS 11.31.130(b) provides that the fifteen-year-old is not liable for solicitation or conspiracy if the substantive offense is not completed.

TD AS 11.16.120(a)(2) provides that a person is not liable as an accomplice if his behavior is "inevitably incidental" to the commission of the offense unless a statute specifically imposes liability. If the potential accomplice is not liable for the commission of a completed offense, TD AS 11.31.130(b) provides that there is also no liability for solicitation or conspiracy.

IV. TD AS 11.31.140. MULTIPLE CONVICTIONS BARRED

Subsection (a) is designed to permit prosecution for attempt, solicitation or conspiracy even if the target crime was completed. Although prosecution is allowed for both the preparatory as well as the completed crime, subsection (c) prohibits convictions of both crimes. As used in this statute "conviction" refers to the imposition of multiple sentences for the listed offenses, not the jury's return of multiple guilty verdicts.

Subsection (b) precludes conviction of more than one preparatory crime for conduct designed to culminate in commission of the same target crime. The subsection reflects the policy of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object; there is no reason to cumulate convictions of attempt, solicitation and conspiracy to commit the same crime.

Subsection (d) is included to emphasize that subsections (b) and (c) deal only with convictions and not with prosecutions. Prosecution may be for one or more preparatory crimes as well as for the completed crime.

Subsection (e) is discussed in the commentary to the Proposed Missouri Criminal Code.

> Subsection . . . [e] states the normal rules where there is more than one criminal objective. If there is only one agreement there is only one conspiracy. If various offenses are the product of a contiuous relationship they should be considered part of one conspiracy. Otherwise multiplication of sentences might become almost fortuitous and, considering the extremely inchoate nature of conspiracy, oppressive and unjust.

PROPOSED MO. CRIM. CODE § 9.020(e), Commentary at 121 (1973).

V. TD AS 11.31.150. PENALTY

Punishment for conspiracy is set one class lower than the target crime. This classification system is consistent with the Code's classification of attempt and solicitation.

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 3. ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES.

Section

400 - 450 See Tentative Draft, Part 3

480 Criminal Mischief in the First Degree

482 Criminal Mischief in the Second Degree

484 Criminal Mischief in the Third Degree

486 Criminal Mischief in the Fourth Degree

490 Definitions

Sec. 11.46.480. CRIMINAL MISCHIEF IN THE FIRST DEGREE. (a) A person commits the crime of criminal mischief in the first degree if, having no right to do so or any reasonable ground to believe he has such a right,

(1) and with intent to cause a substantial interruption or impairment of a service rendered to the public by a utility or by an organization which deals with emergencies involving danger to life or property, he damages or tampers with property of that utility or organization and causes substantial interruption or impairment of service to the public;

(2) and with intent to damage property of another by the use of widely dangerous means, he damages property of another in an amount exceeding $100,000 by the use of widely dangerous means; or

(3) he intentionally damages an oil or gas pipeline or supporting facility.

(b) Criminal mischief in the first degree is a class B felony.

Sec. 11.46.482. CRIMINAL MISCHIEF IN THE SECOND DEGREE. (a) A person commits the crime of criminal mischief in the second degree if, having no right to do so or any reasonable ground to believe he has such a right,

(1) and with intent to damage property of another, he damages property of another in an amount of $500 or more;

(2) he tampers with an oil or gas pipeline or supporting facility with reckless disregard for the risk of harm to or loss of the property; or

(3) he recklessly creates a risk of damage in an amount exceeding $100,000 to property of another by the use of widely dangerous means.

(b) Criminal mischief in the second degree is a class C felony.

Sec. 11.46.484. CRIMINAL MISCHIEF IN THE THIRD DEGREE. (a) A person commits the crime of criminal mischief in the third degree if, with intent to damage property of another, and having no right to do so or any reasonable ground to believe he has such a right, he damages property of another in an amount of $50 or more but less than $500.

(b) Criminal mischief in the third degree is a class A misdemeanor.

Sec. 11.46.486. CRIMINAL MISCHIEF IN THE FOURTH DEGREE. (a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe that he has such a right,

(1) and with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, he tampers with property of another;

(2) he recklessly damages property of another in an amount of $500 or more; or

(3) he intentionally damages property of another.

(b) Criminal mischief in the fourth degree is a class B misdemeanor.

Sec. 11.46.490. DEFINITIONS. As used in secs. 400 - 490 of this

chapter, unless the context requires otherwise,

(1) "oil or gas pipeline or supporting facilities" means real and tangible property used in the exploration for, production or refining of, or pipeline transportation of oil or gas, except for property used solely in the retail distribution of oil or gas;

(2) "tamper" means to interfere with something improperly, meddle with it, or make unwarranted alterations in its existing condition;

(3) "utility" means an enterprise, whether publicly or privately owned or operated, which provides gas, electric, steam, water, sewer, or communications service, and any common carrier;

(4) "widely dangerous means" means any difficult-to-confine substance, force, or other means capable of causing widespread damage, including but not limited to fire, explosion, avalanche, poison, radioactive material, bacteria, collapse of a building, or flood.

ALASKA REVISED CRIMINAL CODE

Chapter 46 - Offenses Against Property

ARTICLE 3. ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES (Part 2)

COMMENTARY

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.46.480-486. CRIMINAL MISCHIEF

A. Existing Law

The primary statute covering damage to property other than by arson is AS 11.20.515, "Malicious mischief and destruction of property." A person who "wilfully or maliciously destroys, defaces, injures or exposes to injury real or personal property not his own" commits the crime of malicious destruction of property and is punishable by imprisonment for up to 10 years and/or a $1000 fine if the damage exceeds $250. If the damage does not exceed $250, the penalty is set at imprisonment for up to 1 year and/or a $1000 fine. The person "who wilfully interferes with or tampers with property not his own, with the purpose to harm the property. . . or with reckless disregard for the risk of harm" commits the crime of malicious mischief and is punishable by imprisonment for a maximum of 1 year and/or a $100 - $5000 fine. Note that the maximum fine is five times greater when property is merely tampered with than when it is actually damaged.

Separate provisions cover damage or interference with any part of an aircraft, AS 11.20.525 (maximum 10 years imprisonment and/or $10,000 fine); malicious destruction of property by a tenant, AS 11.20.575 (maximum 1 year imprisonment

and/or $500 fine); misuse, damage or destruction of a camp, AS 11.20.670-.690 (maximum three month imprisonment and/or $500 fine); damage or destruction of highway, AS 11.20.590(a) (maximum 1 year imprisonment and/or $500 fine); damage or destruction of a traffic control signal or sign, AS 11.20.590(c) (maximum 1 year imprisonment and/or $500 fine); destruction of any part of cemetery, AS 11.40.460 (1 - 30 day imprisonment and $5 - $500 fine); malicious destruction of oil or gas pipeline or supporting facility, AS 11.20.517(a) (10 year maximum and/or $25,000 fine); tampering with oil or gas pipeline or supporting facility, AS 11.20.517(b) (3 year maximum and/or $5000 fine); destruction of sign upon posted oil or gas property, AS 11.20.517(c) (1 year maximum and/or $5000); tampering with posted notices, AS 11.65.030 (1 - 6 month imprisonment or $50 - $300 fine).

Numerous statutes outside Title 11 also cover criminal damage to property. See, e.g., AS 42.20.030 (injury to or interference with telegraph, telephone, electric or gas lines); AS 38.05.360 (waste or injury to state land); AS 35.10.140 (damage or destruction of public works); AS 02.30.020 (tampering with aircraft).

B. The Code Provisions

The needless proliferation of overlapping statutes which carry inconsistent penalty provisions covering damage to or tampering with property is eliminated in the Revised Code by the creation of the four-tiered crime of criminal mischief.

Division of the crime into four degrees is based on four factors: the culpable mental state of the defendant; the amount of damage, if any, caused or risked; the type of property damaged or tampered with; and the means used to cause the damage. Common to each degree of criminal mischief is the requirement that the defendant have no right nor any reasonable ground to believe he has a right to interfere with the property.

1. TD AS 11.46.480. Criminal Mischief in the First Degree

The most aggravated form of criminal mischief, a class B felony, can be committed in any of three ways. Subsection (a)(1) applies to the intentional causing of a "substantial interruption or impairment of a service rendered to the public by a utility [defined in TD AS 11.46.490(a)(3)] or by an organization which deals with emergencies involving danger to life or property." Thus, the destruction of a power line that serves the public or the placing of sugar in the gas tanks of an ambulance fleet, if done with the requisite intent, will be a violation of the first degree statute if substantial interruption or impairment of the service results.

Subsection (a)(2) covers conduct that in some revised codes is designated as the somewhat exotic crime of "causing a catastrophe." See, e.g., MO. REV. STAT. § 569.070 (effective Jan 1, 1979). The definition of "widely dangerous means" (TD AS 11.46.490(a)(4))

insures that the proposed statute is only applicable when a person employs a difficult to confine force such as an avalanche, radioactive material, or flood to cause substantial property damage. The likelihood of serious physical injury resulting from the use of a "widely dangerous means" to cause damage to property justifies classification of this conduct as more serious than other forms of property damage other than by arson. While the defendant must intend to use "widely dangerous means" to damage property of another, he need not intend that the resulting damage exceed $100,000 - strict liability is imposed as to that element.

Subsection (3) parallels the coverage of existing AS 11.20.517(a), enacted during the 1977 legislative session.

2. TD AS 11.46.482. Criminal Mischief in the Second Degree

Criminal mischief in the second degree, a class C felony, may also be committed in three ways. The first, described in subsection (a)(1), occurs when a person intentionally damages property of another and causes damage in an amount of $500 or more. Again, strict liability is imposed as to the amount of damage.

Subsection (a)(2) parallels the coverage of existing AS 11.20.517(b) which, like AS 11.20.517(a), was enacted during the 1977 legislative session. The coverage of the section is an aggravated form of criminal mischief in the fourth degree, TD AS 11.46.486(a)(1), discussed infra.

Subsection (a)(3) prohibits conduct similar to that

described in subsection (a)(2) of the first degree statute. The second degree offense, however, does not require that the defendant actually damage property of another; reckless creation of a risk of damage in excess of $100,000 to property of another by the use of a widely dangerous means is made punishable by subsection (a)(3). The culpable mental state of "recklessly", defined in TD AS 11.11.140(a)(3) (Tentative Draft, Part 2 at 5), requires that the person be "aware of and consciously disregard a substantial and unjustifiable risk that" the damage will occur. Neither ordinary negligence nor criminally negligent behavior are sufficient to constitute a violation of the statute.

3. TD AS 11.46.484. Criminal Mischief in the Third Degree

Criminal mischief in the third degree, a class A misdemeanor, is similar to subsection (a)(1) of the second degree offense. To be guilty of the third degree offense, however, the damage need only exceed $50. The second degree offense requires at least $500 damage.

4. TD AS 11.46.486. Criminal Mischief in the Fourth Degree

Criminal mischief in the fourth degree, a class B misdemeanor, covers the person who merely "tampers" (defined in TD AS 11.46.490(2)) with property. The defendant must act with either a reckless disregard for the risk of harm to the property or an intent to cause substantial inconvenience to another.

Subsection (a)(2) provides that the fourth degree

offense also occurs when a person recklessly damages property of another in an amount $500 or more. The minimum dollar figure of $500 is intended to insure that relatively innocuous behavior that causes minor property damage will not be subject to criminal penalties (e.g., softball goes through window during baseball game).

Subsection (a)(3) provides that the intentional damaging of property of another, regardless of the amount of damage, is criminal mischief in the fourth degree. The statute is broad enough to cover such acts as the destruction of posted signs as well as the defacing of property.

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 5. BUSINESS AND COMMERCIAL OFFENSES.

Section

Sec. 11.46.600. SCHEME TO DEFRAUD IN THE FIRST DEGREE. (a) A person commits the crime of scheme to defraud in the first degree when he

(1) engages in conduct constituting a scheme to defraud ten or more persons, or a scheme to obtain property from ten or more persons by false or fraudulent pretense, representation or promise; and

(2) obtains property from one or more of those persons.

(b) Scheme to defraud in the first degree is a class B felony.

Sec. 11.46.610. SCHEME TO DEFRAUD IN THE SECOND DEGREE. (a) A person commits the crime of scheme to defraud in the second degree when he

(1) engages in conduct constituting a scheme to defraud two or more persons, or a scheme to obtain property from two or more persons by false or fraudulent pretense, representation or promise; and

(2) obtains property from one or more of those persons.

(b) Scheme to defraud in the second degree is a class A misdemeanor.

Sec. 11.46.620. MISAPPLICATION OF PROPERTY. (a) A person commits the

crime of misapplication of property if he knowingly misapplies property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(b) It is not a defense to a prosecution under this section that it may be impossible to identify particular property as belonging to the victim at the time of the defendant's misapplication.

(c) For purposes of this section,

(1) "governmental regulation" includes administrative regulations and judicial rules and orders as well as statutes and ordinances;

(2) "misapply" means to deal with or dispose of property contrary to law or contrary to the terms of the fiduciary relationship or governmental regulation relating to the custody or disposition of that property.

(d) Misapplication of property is a class A misdemeanor.

Sec. 11.46.630. FALSIFYING BUSINESS RECORDS. (a) A person commits the crime of falsifying business records when, with intent to defraud, he

(1) makes or causes a false entry in the business records of an enterprise;

(2) alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise;

(3) omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

(4) prevents the making of a true entry or causes the omission of a true entry in the business records of an enterprise.

(b) For purposes of this section,

(1) "business record" means a writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity;

(2) "enterprise" means a private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or social activity.

(c) Falsifying business records is a class A misdemeanor.

Sec. 11.46.660. COMMERCIAL BRIBE RECEIVING. (a) A person commits the crime of commercial bribe receiving if he

(1) solicits a benefit with the intent to violate a duty to which he is subject as an

(A) agent or employee of another;

(B) trustee, guardian, or other fiduciary;

(C) lawyer, physician, accountant, appraiser, or other professional adviser;

(D) officer, director, partner, manager or other participant in the direction of the affairs of an organization; or

(E) arbitrator or other purportedly disinterested adjudicator or referee; or

(2) accepts or agrees to accept a benefit upon an agreement or understanding that he will violate a duty to which he is subject as described in (1) of this subsection.

(b) Commercial bribe receiving is a class A misdemeanor.

Sec. 11.46.670. COMMERCIAL BRIBERY. (a) A person commits the crime of commercial bribery if he confers, offers to confer or agrees to confer a benefit upon a person with intent to influence that person to violate a duty to which he is subject as described in sec. 660(a)(1) of this chapter.

(b) Commercial bribery is a class A misdemeanor.

Sec. 11.46.680. ENGAGING IN A BUSINESS UNLAWFULLY. (a) A person commits the offense of engaging in a business unlawfully if

(1) he engages in or practices a business, profession or occupation for which a license, certificate or permit is required by law without

having first obtained the required license, certificate or permit or after his license, certificate or permit has been formally suspended, revoked or cancelled; and

(2) a penalty is not otherwise provided by law or lawfully adopted regulation.

(b) This offense is one of strict liability.

(c) Engaging in a business unlawfully is a violation for the first offense. Engaging in a business unlawfully is a class B misdemeanor for the second and each subsequent offense.

Sec. 11.46.685. CRIMINAL USURY IN THE FIRST DEGREE. (a) A person commits the crime of criminal usury in the first degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives money or other property as interest on a loan or forbearance of money or other property at a rate exceeding 25 per cent per annum, or the equivalent rate for a longer or shorter period, as part of a scheme or business of making or collecting usurious loans.

(b) Criminal usury in the first degree is a class C felony.

Sec. 11.46.690. CRIMINAL USURY IN THE SECOND DEGREE. (a) A person commits the offense of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives money or other property as interest on a loan or forbearance of money or other property at a rate exceeding 25 per cent per annum, or the equivalent rate for a longer or shorter period.

(b) Criminal usury in the second degree is a violation.

Sec. 11.46.700. POSSESSION OF USURIOUS LOAN RECORDS. (a) A person commits the crime of possession of usurious loan records when, with knowledge that the interest rates charged exceed 25 per cent per annum, or the equivalent rate for a longer or shorter period, he possesses a writing, paper, instrument or article used to record criminally usurious transactions

prohibited by sec. 685 of this chapter.

(b) Possession of usurious loan records is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

Chapter 46 - Offenses Against Property

ARTICLE 5. BUSINESS AND COMMERCIAL OFFENSES

COMMENTARY

I. TD AS 11.46.600-.610. SCHEME TO DEFRAUD IN THE FIRST AND SECOND DEGREE

The two degrees of scheme to defraud included in the Revised Code are new to existing law. The first degree provision will allow for felony prosecution of frauds involving ten or more victims. The second degree provision provides misdemeanor penalties when between two and ten victims are involved. It is not an element of either crime that a specific dollar loss was suffered by the victims. Both degrees of scheme to defraud, however, require that the defendand obtain some property from at least one of his victims.

The need for such statutes is highlighted when it is considered that the most serious degree of theft in the Revised Code, theft in the first degree, is only a class C felony. As an element of that crime the state must establish that at least $500 was obtained, that the property was taken from the person of the victim, or that the property was a firearm. Thus, if, pursuant to a single scheme to defraud 100 persons a defendant obtains $20 from each of 20 persons he has only committed theft in the second degree, TD AS 11.46.140, a class A misdemeanor.

The Code sections provide that in instances where two or more persons are the victims or potential victims of a scheme to defraud the aggravating factor is the number of victims involved and not the amount of loss. Further, in classifying scheme to defraud in the first degree as a class B felony, the Revised Code provides that the most serious theft related offense is one which involves numerous victims, regardless of the amount of property that is taken.

The two degrees of scheme to defraud are patterned after 18 U.S.C. § 1341 (1970) and the revised version of that statute appearing in the Proposed Federal Criminal Code S. 1437, 95th Cong., 1st Sess. § 1734 (1977). The federal statute is commonly referred to as the mail fraud statute.

> The legislative history of the mail fraud statute is sparse. Although Congress has amended the statute five times since its enactment in 1872, these amendments involved only inconsequential changes in wording. Thus the basic elements of the statute have remained unchanged. Due to the absence of any evidence of legislative intent, the law of mail fraud has been largely judge-made.

Survey of the Law of Mail Fraud, 2 U. Ill. L. F. 237, 239 (1975) [footnotes omitted].

The federal statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . [and uses the mails] shall be imprisoned not more than five years.

18 U.S.C. § 1341 (1970).

Only one degree of mail fraud exists in federal law. N.Y. PENAL LAW §§ 190.60-.65 (McKinney Supp. 1976),

derived directly from the mail fraud statute, distinguish between two degrees of schemes to defraud depending on how many victims are involved in the scheme. The degree structure of the New York statutes is adopted in the Revised Code.

Initially, it should be noted that the federal provision is not limited to fraudulent schemes to obtain property. For example, the mail fraud statute has been interpreted to cover political corruption involving breaches of fiduciary duty and vote fraud. United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974); United States v. States, 488 F.2d 761 (9th Cir. 1973), cert. denied, 417 U.S. 909 (1974). On the other hand, the New York statutes and the two degrees of scheme to defraud in the Revised Code require that property be obtained.

> The requirement that property be obtained as part of the crime indicates that like the antitrust laws, the statutes are directed toward economic crimes. They would therefore not apply, for example, to political activity or data used as part of public advocacy of a particular position.

N.Y. PENAL LAW § 190.60, Comment at 31 (McKinney Supp. 1976).

A substantial body of federal case law has developed around the mail fraud statute making it an effective tool in the area of consumer fraud. Because the language of the proposed statutes parallels that of the mail fraud statute it is expected that the judicial decisions under the federal provision will be highly relevant to the construction of TD AS 11.46.600-.610. As noted in Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report to Accompany S.1, Criminal Justice

Reform Act of 1975, 699 (Comm. Print 1976), the cases prosecuted under the mail fraud statute have in part established the following principles:

> A. The phrase "scheme and artifice to defraud" is to be broadly interpreted; for example, it has been held to reach a scheme calculated to deceive persons of ordinary prudence and comprehension even though no misrepresentation is made.
>
> B. Any scheme which involves elements of trickery or deceit is within the mail fraud statute.
>
> C. A scheme to defraud may be shown by statements of half truths or the concealment of material fact, as well as by affirmative misrepresentation.
>
> D. One who acts with reckless indifference as to whether a representation is true or false is as liable as if he had actual knowledge of the falsity.
>
> E. The success or failure of the scheme is immaterial, and it is not necessary to show that any person was in fact defrauded.
>
> F. A scheme to defraud encompasses false representations as to future intentions, as well as existing facts.
>
> G. A promoter's sincere belief in the ultimate success of his enterprise will not excuse false representations.
>
> H. The mail fraud statute was intended to protect the gullible, the ignorant and the over-credulous as well as the more skeptical. The "monumental credulity of the victim is no shield for the accused."
>
> I. Proof of reliance on the false representation is not necessary.

The commentary that follows accompanies New York's of the scheme to defraud statutes. It provides an excellent discussion of the coverage of the Code's proposed statutes in the area of consumer frauds.

> Like the mail fraud statute, [TD AS 11.41.600 and .610] make the nefarious character of the scheme rather than dollar loss to particular victims the essence of the crime. This serves to focus the attention of the court and jury on the evil nature of the defendant's conduct rather than the extent of pecuniary injury. It also clearly permits prosecution where intentional deception is established but where it is impossible to determine the dollar value of loss to the victims....

> [TD AS 11.41.600 and .610] require that at least one intended victim part with property as a result of the scheme, but state that it is not necessary for the prosecution to prove the identity of other intended victims. The purpose of this provision is to require conduct to be engaged in looking to execution of the scheme, so that it is not a crime which one can commit within one's mind without actual conduct. At the same time the provision by not requiring proof of identity of more than one victim, prevents defendants from defeating justice by bringing pressure to bear on witness-victims named in the indictment. Such pressures could be brought through offering refunds to particular victims or threatening harsh collection tactics if they testified adversely to the defendant.
>
> . . . .
>
> The scheme to defraud statutes also avoid the problem under larceny provisions of adding up the amounts of individual theft to permit felony treatment as grand larceny. . . . Instead, felony treatment under [TD AS 11.41.600], defining a scheme to defraud in the first degree, is based upon the fact that the scheme is one to defraud ten or more persons, rather than merely more than one person as under scheme to defraud in the second degree [TD AS 11.41.510]. The felony grade involved is Class [B]. . . .

N.Y. PENAL LAW §§ 190.60,.65, Commentary at 29-30 (McKinney Supp. 1976).

II. TD AS 11.46.620. MISAPPLICATION OF PROPERTY

A. Existing Law

Currently, at least four statutes in Title 11 cover conduct involving misapplication of property by fiduciaries and government employees. AS 11.20.330, "Embezzlement by a trustee," applies to a trustee who, "with intent to defraud, converts the property or any portion to his own use or benefit, or to the use and benefit of another not entitled to it." If the property converted exceeds $100, punishment is from one to ten years, otherwise punishment is from one month to one year or $25-$100 fine. AS 11.20.290, "Embezzlement by a bailee,"

applies to a bailee who "wrongfully converts to his own use, or who fails, neglects, or refuses to deliver, keep, or account for, according to the nature of his trust, money or property of another." Punishment is identical to that provided for violation of AS 11.20.330. "Embezzlement by a fiduciary," AS 11.20.340, covers conduct similar to AS 11.20.330 but only applies to the acts of a "banker, broker, merchant, attorney or agent." Punishment is also identical to that provided for a violation of AS 11.20.330.

Embezzlement of public money is prohibited by AS 11.20.300. No intent to defraud is required. The crime is committed when a person having in his possession money belonging to the government "converts [the money] or any portion to his own use or loans it or any portion, or neglects or refuses to pay it or any portion over as required by law." Punishment is set at one to fifteen years imprisonment and a fine equal to twice the amount of money involved.

B. The Code Provision

The Code provision applies to two classes of persons: (1) those who hold property as a "fiduciary," a term to be defined in the general definition section of the Code as a "trustee, guardian, executor, administrator, receiver or any other person carrying on functions of trust on behalf of another person or organization," and (2) those who have access to property belonging to the government or a financial institution. "Government" and "financial institution" are defined

in TD AS 11.46.990(4), (5). See Tentative Draft, Part 3, at 98. The culpability element requires knowledge that the actor is misapplying property, i.e., acting contrary to legal rules governing the care of the property in question. The potential defense that it may be impossible to identify the particular property involved due to commingling, discussed in Tentative Draft, Part 3, at 42, is specifically eliminated in subsection (b).

Note that while similar provisions in a number of other revised codes require that the misapplication involve a "substantial risk of loss or detriment to the owner of the property" (see, e.g., HAW. REV. STAT. § 708-874 (Special Pamphlet 1975)), this element does not appear in the proposed statute. The Subcommission concluded that any knowing misapplication by one of the persons covered by the statute is sufficient to justify the imposition of criminal penalties.

Misapplication of property is classified as a class A misdemeanor. This sanction should be sufficient to deter persons from wrongfully dealing with property when they have no intent to deprive the rightful owner of it. If such an intent can be established, the defendant may be prosecuted for theft.

III. TD AS 11.46.630. FALSIFYING BUSINESS RECORDS

A. Existing Law

Falsifying or destroying corporate or company records is currently prohibited by AS 11.20.430. Punishment is set at imprisonment for three months to one year, or a

fine of $50 to $1000. The defendant must be or assume to be an "officer, agent or member of a private corporation or company who, with intent to defraud or deceive, wilfully and knowingly destroys, alters, mutilates, or in any manner falsifies . . . books, papers, writings, or securities belonging to or in the possession of the corporation or company."

B. The Code Provision

The Revised Code substantially restates existing law and follows the modern trend in maintaining falsification of business records as a distinct substantive offense. As noted in the Model Penal Code Commentary,

> [i]n a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church, union or club.

MODEL PENAL CODE § 223.7, Comment at 98, (Tent. Draft No. 11 1960).

As in existing law, the offense of falsifying business records is directed at conduct preliminary to the commission of fraud. As an element of the offense the state must establish that the defendant acted with an "intent to defraud." Acting with that intent the defendant must make a false entry in, or omit, remove or prevent the making of a true entry in the business records of an enterprise. The offense is also committed when the defendant causes the omission of a true entry or causes the making of a false entry in business records.

IV. TD AS 11.46.660-.670. COMMERCIAL BRIBE RECEIVING; COMMERCIAL BRIBERY

Though the crimes of commercial bribe receiving and commercial bribery are new to existing law, similar provisions appear in a significant number of recently revised codes. See, e.g., HAW. REV. STAT. § 708-880 (Special Pamphlet 1975); ILL. ANN. STAT. ch.38, § 29 A-1, A-3 (Smith-Hurd); N.Y. PENAL LAW §§ 180.00-.08 (McKinney Supp. 1976).

> Through the last century, most states attempted to regulate the behavior of unscrupulous public officials through laws that defined bribery and extortion of public officials as a criminal offense. In the last few years, however, states have begun to recognize that bribery in the private sector can also be a major threat -- one that can undermine a competitive economic system. As a result, some thirty states have moved to specifically prohibit commercial bribery.
>
> The dangers of ignoring commercial bribery are quite clear. Gifts of endless variety are traded to influence an employee to improperly carry out a responsibility entrusted to him by an individual or corporation. But when bribery successfully gives a firm an unfair advantage over competitors, other businesses may be forced to do the same in order to survive.

The States Combat White Collar Crime, National Conference of State Legislatures (1976) at 10.

Commercial bribe receiving, TD AS 11.46.660, a class A misdemeanor, covers commercial bribe solicitors or receivers. The crime occurs when a person solicits a benefit with intent to violate a duty to which he is subject as one of the five general classes of persons described in subsections (a)(1)(A)-(E), or when he accepts or agrees to accept a benefit with the intent to violate a duty, or upon an

agreement or understanding that he will violate a duty, to which he is subject as one of those persons.

The five general classes are defined broadly to cover all areas where a duty of fidelity is owed.

> The nature and scope of such duties are defined by common and statutory law regulating or creating the various legal relationships involved. Thus, for example, the duty of an employee to an employer may be not to give away trade secrets, whereas the duty of a fiduciary to his beneficiary or a union representative of an employee's welfare fund to employees may be to exercise independent judgment.

HAW. REV. STAT. § 708-880, Commentary at 227 (Special Pamphlet 1975).

Commercial bribery, TD AS 11.46.670, a class A misdemeanor aimed at the person who offers or gives a bribe, parallels the Code's general bribery statute, TD AS 11.56.100 (discussed in Tentative Draft, Part 2, Commentary at 93-94).

V. TD AS 11.46.680. ENGAGING IN A BUSINESS UNLAWFULLY

A. Existing Law

Currently license requirements for various businesses and professions are regulated in statutes outside Title 11. Practice without a license is punished in a variety of ways, ranging from $100 fines (e.g., dental hygienist under AS 08.32.180) to one year and/or $1000 fine (e.g., explosives handlers under AS 08.52.080). Some provisions require licenses but provide no criminal penalty for practicing without one (e.g., AS 08.98.230, veterinary practice without a license subject only to civil injunction).

B. The Code Provision

The Code provision of engaging in a business unlawfully will only apply to those businesses, professions or occupations for which a license certificate or permit is required but no penalty is provided by law or regulation for failing to obtain the license, certificate or permit, or engaging in the business after the permit has been suspended, revoked or terminated. The offense is one of strict liability; culpability need not be established as to any element of the offense. Note that when a license is required is not determined in the Revised Code. This determination is made by consulting the detailed provisions appearing elsewhere in the Alaska statutes.

Engaging in a business unlawfully is a violation for the first offense. However, second and subsequent offenses are class B misdemeanors.

VI. TD AS 11.46.685, .690, .700. CRIMINAL USURY IN THE FIRST AND SECOND DEGREES; POSSESSION OF USURIOUS LOAN RECORDS

A. Existing Law

AS 45.45.010 sets out limits on the legal rate of interest in the state. The rate of interest is generally set at 8% in AS 45.45.010(a), though in certain circumstances only 6% may be charged. With regard to contract or loan commitments dated after June 4, 1976, the legal rate of

interest may be no more than "five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District that prevailed on the 25th day of the month preceeding the commencement of the calendar quarter during which the contract or loan commitment is made." AS 45.45.010(b). Though no criminal penalties are provided for charging interest in an amount exceeding that permitted by AS 45.45.010, a number of civil remedies are available to the borrower if the interest charged exceeds the legal rate. AS 45.45.030, .040.

The Alaska Small Loans Act, AS 06.20, allows interest on loans charged by licensees under the act to exceed that otherwise permitted by law. AS 06.20.010. On loans less than $1,500, interest charged may be as high as 3% a month. AS 06.20.230. "Any person, copartnership, association, or corporation and the several members, officers, directors, agents, and employees thereof who violate . . . [AS 06.20.230] are guilty of a misdemeanor." AS 06.20.320.

B. The Code Provisions

TD AS 11.46.685-.700 are included in the Revised Code to prohibit "loansharking", conduct that depends upon illegal harm, or the fear of such harm, to recover the loan and the invariably high interest charges attaching to it.

> [Loansharking] tends to thrive because, by virtue of the means of collection and the anticipated profit, the loanshark will take "risks" which do not appeal to legitimate lenders. Traditional offenses, such as assault or extortion, are regarded as inadequate to deal with this racket because actual use of force or

> the making of threats are rarely necessary, and even more rarely are susceptible to legal proof.

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, II WORKING PAPERS 893 (1970).

Criminal usury in the first and second degree require that the defendant knowingly charge interest at a rate exceeding 25%. The interest rate refers to a fixed amount ascertainable at the time the loan was made. The statutes do not cover high risk loans where the return on the loan is set at a certain percentage of profits.

To be in violation of either statute the person must not be authorized or permitted by law to charge an interest rate exceeding 25%. A small business loan pursuant to AS 06.20, for example, would therefore not violate the statute. Note that there is no requirement that the lender know he is not authorized by law to charge an interest rate exceeding 25% - ignorance of the law is no defense to either degree of criminal usury.

Criminal usury in the second degree, TD AS 11.46.690, a violation, may be committed by making a single loan with interest in excess of 25%. Criminal usury in the first degree, a class C felony, requires proof that the loan was part of a "scheme or business of making or collecting usurious loans."

The crime of possession of usurious loan records, TD AS 11.46.700, a class A misdemeanor is designed as a tool against the loansharker who "may be able to avert proof of specific overt transactions but cannot conduct business without keeping records." N.Y. PENAL LAW § 190.45, Commentary at 379 (McKinney 1975).

CHAPTER 56. OFFENSES AGAINST PUBLIC HEALTH AND DECENCY.

ARTICLE 3. ESCAPE AND RELATED OFFENSES.

Section

Sec. 11.56.300. ESCAPE IN THE FIRST DEGREE. (a) A person commits the crime of escape in the first degree if, without lawful authority, he removes himself from official detention by means of a deadly weapon.

(b) Escape in the first degree is a class A felony.

Sec. 11.56.310. ESCAPE IN THE SECOND DEGREE. (a) A person commits the crime of escape in the second degree if, without lawful authority, he

(1) removes himself from

(A) official detention on a charge of a felony or for extradition;

(B) a correctional facility while under official detention; or

(C) official detention and during the escape, or at any time before being restored to official detention, he possesses on or about his person a deadly weapon; or

(2) violates sec. 350 of this chapter and during the time of his unlawful evasion, or at any time before being restored to official detention, he possesses on or about his person a deadly weapon.

(b) Escape in the second degree is a class B felony.

Sec. 11.56.320. ESCAPE IN THE THIRD DEGREE. (a) A person commits the crime of escape in the third degree if he removes himself from official detention during any lawful movement or activity incident to confinement within a correctional facility on a charge of a misdemeanor.

(b) Escape in the third degree is a class C felony.

Sec. 11.56.330. ESCAPE IN THE FOURTH DEGREE. (a) A person commits the crime of escape in the fourth degree if, without lawful authority, he removes himself from official detention or if he violates sec. 350 of this chapter and leaves or attempts to leave the state.

(b) Escape in the fourth degree is a class A misdemeanor.

Sec. 11.56.340. UNLAWFUL EVASION IN THE FIRST DEGREE. (a) A person commits the crime of unlawful evasion in the first degree if he fails to return to official detention on a charge of a felony following temporary leave granted for a specific purpose or limited period, including but not limited to privileges granted under AS 33.30.150, 33.30.250 or 33.30.260.

(b) Unlawful evasion in the first degree is a class A misdemeanor.

Sec. 11.56.350. UNLAWFUL EVASION IN THE SECOND DEGREE. (a) A person commits the crime of unlawful evasion in the second degree if he fails to return to official detention following temporary leave granted for a specific purpose or limited period, including but not limited to privileges granted under AS 33.30.150, 33.30.250 or 33.30.260.

(b) Unlawful evasion in the second degree is a class B misdemeanor.

Sec. 11.56.360. ATTEMPTING TO AID AN ESCAPE. (a) A person commits the crime of attempting to aid an escape if, with the intent of

effecting a person's escape from official detention, he attempts to assist a person who is under official detention to escape.

(b) Attempting to aid an escape is a class C felony.

Sec. 11.56.370. CRIMINALLY NEGLIGENTLY PERMITTING ESCAPE. (a) A public servant who is required by law to have charge of a person charged with or convicted of a crime commits the crime of criminally negligently permitting escape if with criminal negligence he permits a person under official detention to escape.

(b) Criminally negligently permitting escape is a class C felony.

Sec. 11.56.380. PROMOTING CONTRABAND. (a) A person commits the crime of promoting contraband if he knowingly

(1) introduces, takes, conveys, or attempts to introduce, take, or convey contraband into or out of a correctional facility; or

(2) makes, obtains, possesses, or attempts to make, obtain, or possess anything he knows to be contraband while under official detention within a correctional facility.

(b) Promoting contraband is a class C felony.

Sec. 11.56.390. DEFINITIONS. As used in secs. 300 - 390 of this chapter, unless the context requires otherwise,

(1) "contraband" means any article or thing which persons confined in a correctional facility are prohibited by law, or by a regulation adopted by the commissioner of health and social services, from obtaining, making, or possessing in that correctional facility;

(2) "correctional facility" means premises, or a portion of premises, used for the confinement of persons under official detention;

(3) "official detention" means custody, arrest, surrender in lieu of arrest, or confinement under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release.

ALASKA REVISED CRIMINAL CODE

CHAPTER 56. Offenses Against Public Administration

ARTICLE 3. ESCAPE AND RELATED OFFENSES

COMMENTARY

I. TD AS 11.56.300 - .350. ESCAPE; UNLAWFUL EVASION

A. Existing Law

During the 1976 legislative session, the escape statute was substantially amended and the new crime of unlawful evasion was adopted. Escape, AS 11.30.090, was divided into three degrees. Unlawful evasion, AS 11.30.093, was divided into two degrees. Punishment for escape was set at imprisonment for from 3 months (AS 11.30.095(c)) to 5 years (AS 11.30.095(a)), the authorized term depending on such factors as whether the escapee had committed a felony or a misdemeanor and whether the escapee possessed a deadly weapon. Punishment for unlawful evasion was set at imprisonment for a minimum of 30 days (AS 11.30.095(e)) and a maximum of one year. The existing statute also includes provisions governing the "suspensions of imposition or execution of sentence or granting of parole" for persons convicted of escape or unlawful evasion. AS 11.30.095(f)-(i).

B. The Code Provisions

While leaving most of the provisions of the escape and unlawful evasion statutes intact, the Revised Code makes three significant changes in existing law. These changes are summarized below:

1. Four degrees of escape are recognized in the Code as compared to three in existing law. The new offense, escape in the first degree, TD AS 11.56.300, is the most serious escape offense in the Code and is classified as a class A felony. The crime requires that a person remove himself from official detention by means of a deadly weapon. The term "official detention" is defined in TD AS 11.56.390(2) as "custody, arrest or surrender in lieu of arrest, or confinement pursuant to an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release." This definition is not intended to cover placement of a juvenile in a foster home pursuant to a temporary custody order.

2. The Code classifies all escapes from correctional facilities (defined in TD AS 11.56.390(3) as "premises, or a portion of premises, used for the confinement of persons under official detention") as escape in the second degree, a class B felony. TD AS 11.56.310(1)(B). Existing law differentiates between an escapee who has committed a felony and one who has committed a misdemeanor; an escape by a misdemeanant is classified as a misdemeanor. The Subcommission concluded that the danger to society resulting from correc-

tional facility escapes is substantial, regardless of whether the escapee is a felon or misdemeanant. The classification of all correctional facility escapes as serious felonies is consistent with the Code provision on the justifiable use of force in preventing an escape from a correctional facility, TD AS 11.21.210, Tentative Draft, Part 2 at 44 (deadly force may be used to the extent reasonably believed necessary to prevent any escape from a correctional facility). Note, however, that the Code continues to distinguish between other escapes from official detention (e.g., escape from custody of a peace officer) based on the class of offense committed by the escapee. Compare TD AS 11.56.310(1)(A) with TD AS 11.56.330.

3. The offense of escape in the third degree, TD AS 11.56.320, a class C felony, covers escapes "during any lawful movement or activity incident to confinement within a correctional facility on a charge of a misdemeanor." Conduct of this nature would include an escape from a courtroom by a convicted misdemeanant prior to being transported to a correctional facility. It would also include an escape by a person who is confined in a correctional facility while he is being transported incident to that confinement, e.g., transportation to a dentist.

If a felon escapes under such circumstances he has committed escape in the second degree, TD AS 11.56.310(1)(A), a class B felony.

II. TD AS 11.56.360. ATTEMPTING TO AID AN ESCAPE

Existing Law - The Code Provision

TD AS 11.56.360 prohibits conduct that is more likely to occur in theory than in practice. Nevertheless, the seriousness of the prohibited conduct, the fact that existing law insures comparable coverage (see AS 11.30.080, aiding escape from confinement; AS 11.30.130, rescue) and the inapplicability of the more general attempt and complicity statutes to the prohibited conduct, require that the crime of "attempting to aid an escape" appear in the Revised Code. In discussing the coverage of TD AS 11.56.360, it is first useful to consider what is not covered by the statute.

The statute does not cover conduct of the person who, with intent to promote an escape, aids or abets a person in committing an escape or attempted escape. For example, consider the case where David, a prisoner in a correctional facility, is furnished escape plans by Doug, who is outside the facility. If David attempts to escape or succeeds in escaping, both David and Doug would be guilty of some form of escape or attempted escape. Doug would be accountable for David's behavior through the Code's general principles of complicity. See TD AS 11.16.110.

What the Code provision on attempting to aid an escape does cover, however, is the conduct by Doug who, without prior

plan with David, attempts gratuitously to "rescue" David from official detention and David does not want to have anything to do with Doug's plan. In such a situation David has committed no crime since he did not attempt to escape or escape. As Doug's criminal liability is dependent on David's conduct, Doug could not be charged as an accessory to David's crime: David has committed no crime.

The Code provision on attempting to aid an escape insures that, in the second hypothetical, Doug could be charged with a crime. Doug has committed the crime of attempting to aid an escape, a class C felony, since he has acted with the intent of effecting David's escape and has attempted to assist him in escaping.

III. TD AS 11.56.370. CRIMINALLY NEGLIGENTLY PERMITTING ESCAPE

A. Existing Law

AS 11.30.120 provides 1 - 5 years imprisonment for a "peace officer who voluntarily or through negligence allows a person or prisoner committed to or in his custody to escape, or intentionally refuses to receive into his custody a person or prisoner lawfully committed to him."

B. The Code Provision

The Code retains the coverage of the existing statute but broadens it beyond the peace officer to cover the actions of "any public servant who is authorized and required by law to have charge of any person charged with or

convicted of any crime." Such a person commits the crime of criminally negligently permitting escape if "with criminal negligence he allows or permits a person under official detention to escape." The potential danger resulting from such escapes justifies the imposition of criminal liability based on criminally negligent behavior. The offense is classified as a class C felony.

IV. TD AS 11.56.390. PROMOTING CONTRABAND

A. Existing Law

AS 33.30.055 prohibits a person from, contrary to a rule or regulation of the Commissioner of Health and Social Services, (1) attempting to introduce contraband, as defined by the Commissioner, into or out of a correctional facility or (2) taking or sending or attempting to take or send contraband, as defined by the Commissioner, from a facility.

B. The Code Provision

The crime of promoting contraband, a class C felony, prohibits two acts. The first, described in paragraph (1), is the introduction or attempted introduction of contraband into or out of a correctional facility. With regard to the culpability requirement for this conduct, the defendant must know he is introducing something into a correctional facility and be at least reckless as to whether the substance is contraband.

Paragraph (2) prohibits a person under official detention in a correctional facility from making, obtaining, possessing or attempting to make, obtain or possess contraband. In this instance, the person must know that the substance he possesses is contraband.

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION.

ARTICLE 4. OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS.

Section

Sec. 11.56.510. INFLUENCING A WITNESS. (a) A person commits the crime of influencing a witness if he

(1) uses physical force on anyone, damages the property of anyone, or threatens anyone with intent to

(A) improperly influence a witness; or

(B) retaliate against a witness because of his testimony in an official proceeding; or

(2) confers, offers to confer or agrees to confer a benefit upon a witness with intent to improperly influence that witness.

(b) Influencing a witness is a class B felony.

Sec. 11.56.530. RECEIVING A BRIBE BY A WITNESS. (a) A person commits the crime of receiving a bribe by a witness if he knowingly solicits, accepts or agrees to accept a benefit upon an agreement or understanding that he will be improperly influenced as a witness.

(b) Receiving a bribe by a witness is a class B felony.

Sec. 11.56.540. TAMPERING WITH A WITNESS. (a) A person commits the

crime of tampering with a witness if he knowingly induces or attempts to induce a witness to

(1) testify falsely, offer misleading testimony or unlawfully withhold testimony in an official proceeding; or

(2) absent himself from an official proceeding to which he has been summoned.

(b) Tampering with a witness is a class A misdemeanor.

Sec. 11.56.550. INFLUENCING A JUROR. (a) A person commits the crime of influencing a juror if he

(1) uses physical force on anyone, damages the property of anyone, or threatens anyone with intent to

(A) influence a juror's vote, opinion, decision, or other action as a juror; or

(B) retaliate against a juror because of his serving as a juror or taking any action as a juror;

(2) uses physical force on a juror, damages the property of a juror, or threatens a juror with intent to influence the outcome of an official proceeding; or

(3) confers, offers to confer, or agrees to confer a benefit upon a juror with intent to

(A) influence the juror's vote, opinion, decision, or other action as a juror; or

(B) influence the outcome of an official proceeding.

(b) Influencing a juror is a class B felony.

Sec. 11.56.580. RECEIVING A BRIBE BY A JUROR. (a) A person commits the crime of receiving a bribe by a juror if he knowingly solicits, accepts, or agrees to accept a benefit upon an agreement or understanding that his vote, decision, opinion, or other action as a juror will be influenced.

(b) Receiving a bribe by a juror is a class B felony.

Sec. 11.56.590. JURY TAMPERING. (a) A person commits the crime of jury tampering if he directly or indirectly communicates with a juror other than as permitted by the rules governing the official proceeding with intent to

(1) influence the juror's vote, opinion, decision, or other action as a juror; or

(2) influence the outcome of the official proceeding.

(b) Jury tampering is a class C felony.

Sec. 11.56.600. MISCONDUCT BY A JUROR. (a) A person commits the crime of misconduct by a juror if, being a juror, he promises or agrees, before the submission of any part of an official proceeding to a jury for deliberation, to vote for or agree to a verdict for or against a party in the official proceeding, or otherwise to influence the outcome of the official proceeding.

(b) Misconduct by a juror is a class C felony.

Sec. 11.56.605. RECEIVING UNAUTHORIZED COMMUNICATIONS BY A JUROR. (a) A person commits the crime of receiving unauthorized communications by a juror if, being a juror, he receives a communication, other than as permitted by the rules governing the official proceeding, in relation to the official proceeding without immediately disclosing the communication to the court.

(b) Receiving unauthorized communications by a juror is a class B misdemeanor.

Sec. 11.56.610. TAMPERING WITH PHYSICAL EVIDENCE. (a) A person commits the crime of tampering with physical evidence if he

(1) destroys, mutilates, alters, suppresses, conceals or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation;

(2) makes, presents or uses physical evidence, knowing it to be false, with intent to mislead a juror who is engaged in an official proceeding or a public servant who is engaged in an official proceeding or a

criminal investigation;

(3) prevents the production of physical evidence in an official proceeding or a criminal investigation by the use of physical force, threat or deception against anyone; or

(4) does any act described by (1), (2) or (3) of this subsection with intent to prevent the institution of an official proceeding.

(b) Tampering with physical evidence is a class C felony.

Sec. 11.56.620. SIMULATING LEGAL PROCESS. (a) A person commits the crime of simulating legal process if with intent to cause the recipient to take an action on it he issues, sends or delivers

(1) a request for payment of money on behalf of any creditor that in form and substance simulates any legal process issued by any court of this state; or

(2) any purported summons, subpoena or other legal process knowing that said process was not issued or authorized by a court or other official body authorized by law to do so.

(b) Simulating legal process is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

Chapter 56. Offenses Against Public Administration

ARTICLE 4. OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

COMMENTARY

I. TD AS 11.56.510, .530, .540. INFLUENCING A WITNESS, RECEIVING A BRIBE BY A WITNESS, TAMPERING WITH A WITNESS

A. Existing Law

"Influencing witnesses, judges or jurors or obstructing administration of justice," AS 11.30.320, provides a maximum five year penalty for the violation of any of the five subsections of that statute. Subsection (1) covers the person who "corruptly, or by threats or force, or by a threatening letter or communication, endeavors to influence, intimidate, or impede a witness in a court of this state or before a committing magistrate." Subsection (2) provides specific coverage for retaliation against a witness by injuring him or his property "because of his attending or having attended a court." The "catch-all" provision in subsection (5) refers to the person who "corruptly or by threats or force, or by threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice."

A person who procures another to commit the crime of perjury is guilty of "Subornation of perjury," AS 11.30.010, punishable by one - five years imprisonment. AS 11.30.020(c).

B. The Code Provisions

TD AS 11.56.510 and .540 gather the various

methods whereby one may improperly interfere with a witness. If a person retaliates against a witness or attempts to improperly influence a witness by physical force, threat, or bribe, the crime committed is influencing a witness, TD AS 11.56.510, a class B felony. If the defendant otherwise attempts to influence a witness, the crime committed is tampering with a witness, TD AS 11.56.540, a class A misdemeanor. If the witness solicits, receives or agrees to accept a bribe, the witness commits the crime of receiving a bribe by a witness, TD AS 11.56.530, a class B felony.

"Witness" is defined in TD AS 11.56.900(8) to include not only those persons summoned or appearing in an official proceeding but also those persons whom the "defendant believes may be called as a witness in an official proceeding, present or future." This definition avoids confusion as to when an individual actually becomes a witness and emphasizes that the harm in the conduct prohibited in TD AS 11.56.510-.540 is the attempt to interfere with the course of an official proceeding. "Official proceeding" is defined in TD AS 11.56.900(4) as one heard before "a legislative, judicial, administrative or other governmental body or official authorized to hear evidence under oath."

1. TD AS 11.56.510. Influencing a Witness

The crime of influencing a witness occurs when a person uses physical force on anyone, damages property of anyone or threatens anyone [for definition of "threat", see TD AS 11.46.990(10) (Tentative Draft, Part 2, at 99-100)] with intent

to "improperly influence a witness" or with an intent to "retaliate against a witness because of his testimony in an official proceeding."

The term "improperly influence a witness" is defined in TD AS 11.56.900(1). The term includes causing or inducing the failure to testify [subsection (C)], an attempt to have a witness avoid legal process summoning him to testify [subsection (B)] as well as causing or inducing a witness to offer false or misleading testimony or withhold testimony [subsection (A)]. A person also "improperly influences a witness" when he causes the witness to engage in tampering with physical evidence [subsection (D)].

Influencing a witness is also committed when a person "confers, offers to confer or agrees to confer a benefit upon a witness with intent to improperly influence that witness." The statute parallels the proposed general bribery statute, TD AS 11.56.100 (discussed in Tentative Draft, Part 2, Commentary at 93-94) and is similar to the existing offense of subornation of perjury, AS 11.30.010(b). For a discussion of the term "benefit", see Tentative Draft, Part 2, Commentary at 87-89.

2. TD AS 11.56.520. Receiving a bribe by a witness

Paralleling the existing and proposed general bribery statues which punish both the offeror and receiver of a bribe, TD AS 11.56.530 provides that it is a crime for a witness to solicit, receive or agree to accept a bribe upon an agreement or understanding that he will be improperly influenced as a witness.

3. TD AS 11.56.540. Tampering With a Witness

The crime of tampering with a witness differs in three respects from the crime of influencing a witness. First, the means by which tampering with a witness is committed (inducing or attempting to induce) are not as culpable or as overt as the means specified in the crime of influencing a witness (force, threat or bribery). Tampering with a witness is consequently graded as a class A misdemeanor.

Second, unlike the proposed statute on influencing a witness, an attempt to induce a prospective witness to avoid process is not made an offense. This distinction is discussed in the Commentary to the Proposed Michigan Revised Criminal Code § 5020 at 414.

> [W]hile [TD AS 11.56.510] make[s] it unlawful to use a bribe or threat to induce a witness to avoid legal process, [TD AS 11.56.540] does not bar an attempt to achieve that objective by persuasion or argument. A defense attorney, for example, would not be prohibited from attempting by persuasion or pleading to induce a witness to avoid process by leaving the state. Although the attorney's activity might raise certain ethical issues, it should not give use to criminal liability, since neither the means used nor the objective sought is unlawful in itself.

Finally, while influencing a witness includes acts done with intent to induce a witness to "withhold testimony" [TD AS 11.56.510(1)(A); TD AS 11.56.900(1)(A)], the crime of tampering with a witness requires an intent to induce a witness to "unlawfully withhold testimony." Thus while it would not be tampering with a witness to persuade a witness to lawfully refuse to testify on grounds of personal

privilege, i.e., privilege against self-incrimination, it would be influencing a witness to attempt to do so by force, threat or bribe.

II. TD AS 11.56.550, .580, .590, .600. INFLUENCING A JUROR, RECEIVING A BRIBE BY A JUROR, JURY TAMPERING, MISCONDUCT BY A JUROR

A. Existing Law

"Influencing witnesses, judges or jurors or obstructing administration of justice," AS 11.30.320, provides a maximum five year penalty for the violation of any of the five subsections of that statute. Subsection (1) covers the person who "corruptly, or by threats or force, or by a threatening letter or communication, endeavors to influence, intimidate, or impede . . . a grand or petit juror." Subsection (3) provides specific coverage of retaliation against a grand or petit juror by injuring him "because of a verdict or indictment assented to by him, or because of his being or having been a juror." The "catch-all" provision in subsection (5) refers to the person who "corruptly or by threats or force, or by threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice."

AS 11.30.040 provides penalties for bribing a "judicial officer," a term defined in AS 11.30.060(2) to include a person "summoned as a juror in a court, in an inquest, or before any officer, from the time he is summoned." Thus,

bribery of a juror and accepting a bribe by a juror are now prohibited in AS 11.30.040 and AS 11.30.050.

The contempt statute, AS 9.50.010, provides in subsection (11) that it is contempt for a juror to receive "a communication from a party or other person in respect to [an action or proceeding] without immediately disclosing it to the court."

B. The Code Provisions

TD AS 11.56.550 and .570 gather the various methods whereby one may improperly interfere with a juror. Similar to the distinction it draws between influencing a witness and tampering with a witness, the Revised Code distinguishes between different forms of conduct intended to interfere with a juror. If a person retaliates against a juror or attempts to influence his vote or affect the outcome of an official proceeding by physical force, by threat, or by bribe, the crime committed is influencing a juror, TD AS 11.56.550, a class B felony. If the person attempts to otherwise interfere with a juror, the crime is jury tampering, a class C felony.

If the juror solicits, receives or agrees to accept a bribe, the juror commits the crime of receiving a bribe by a juror, TD AS 11.56.580, a class B felony. If the juror otherwise agrees to vote for or against a party prior to submission of the official proceeding to the jury, he commits the crime of misconduct by a juror, a class C felony. If the juror receives unauthorized communications without disclosing the communication to the court, he commits the crime of

receiving unauthorized communications by a juror, TD AS 11.56.605, a class B misdemeanor. "Juror" is defined in TD AS 11.56.900(3) as "a person who is a member of an impaneled jury or a person who has been drawn or summoned to attend as a prospective juror."

1. TD AS 11.56.550. Influencing a Juror

The crime of influencing a juror occurs when a person uses physical force on anyone, damages property of anyone or threatens anyone with intent to "influence a juror's vote, opinion, decision or other action as a juror." The crime is also committed, pursuant to subsection (2), when the person acts with an intent to retaliate against the juror because of his serving as a juror. This subsection covers conduct where the defendant does not necessarily intend to influence the juror's vote. A person, for example, who assaults a juror because he was angry with the verdict would violate subsection (2).

Influencing a juror is also committed when a person confers, offers to confer or agrees to confer a benefit upon a juror with intent to influence the juror or affect the outcome of the official proceeding. Note that the Code does not include a juror within the definition of "public servant". Consequently, a juror is not subject to the general bribery statutes. A separate provision is necessary.

2. TD AS 11.56.580. Receiving a Bribe by a Juror

Paralleling the existing and proposed general bribery statutes which punish both the offeror and receiver of a bribe,

TD AS 11.56.580 provides that it is a crime for a juror to solicit, receive or agree to accept a bribe upon an agreement or understanding that his vote or other action as a juror will be influenced.

3. TD AS 11.56.590. Jury Tampering

The crime of jury tampering differs in only one respect from the crime of influencing a juror. The means by which tampering with a juror is committed (communicating with intent to influence) are less culpable than the means specified in the crime of influencing a juror (force, threat or bribery). Tampering with a juror is consequently only graded as a class C felony as compared to the B felony classification for influencing a juror.

4. TD AS 11.56.600. Misconduct by a Juror

The crime of misconduct by a juror is similar to the crime of receiving a bribe by a juror in that both require that the juror improperly agree to be influenced as a juror. However, unlike the crime of receiving a bribe by a juror, the crime of misconduct by a juror does not require that the juror agree to be influenced as a consequence of the acceptance of a benefit. Mere agreements to vote for a party in the official proceeding or to otherwise influence the official proceeding are proscribed in TD AS 11.56.600, a class C felony.

5. TD AS 11.56.605. Receiving Unauthorized Communications by a Juror

This section prohibits the receipt of any unauthorized

communication by a juror without immediately disclosing the communication to the court. The juror who allows unauthorized communications to be made to him calls into question his impartiality. The danger that such communications represent to the integrity of the jury verdict merits criminalization of both the person who initiates it (TD AS 11.56.590, jury tampering) and the juror who knowingly allows it to be made.

III. TD AS 11.56.610. TAMPERING WITH PHYSICAL EVIDENCE

A. Existing Law

Both the preparing of false evidence and the offering of false evidence are currently designated as felonies under AS 11.30.290-.300. Penalties of up to two years imprisonment and/or a fine of not more than $10,000 may be imposed on one who prepares a "false or antedated book, paper, record, instrument in writing, or other matter or thing" with the intent that it be fraudulently produced at a trial, proceeding or inquiry as genuine. AS 11.30.300, .310. Identical penalties apply to one who offers as genuine, a "book, paper, document, or other instrument in writing" in evidence at a "trial, proceeding, inquiry, or investigation," knowing the article to be forged, antedated or fraudulently altered. AS 11.30.290, .310. Note that the "preparing" statute covers "other matter[s] or thing[s]" but does not refer to use in an investigation, while the "offering" statute is limited to written instruments but covers investigations.

AS 11.30.315, imposes misdemeanor rather than

felony penalties of imprisonment for one year and/or a fine of $1,000 on one who, with intent to prevent evidence from being discovered or produced, "wilfully destroys, alters or conceals evidence concerning the commission of a crime or evidence which is being sought for production during an investigation, inquiry or trial."

B. The Code Provision

The Revised Code combines these various existing statutes into one provision designed to complement other sections that protect official proceedings from being intentionally subverted. The Code provision prohibits tampering with "physical evidence", a term defined at TD AS 11.56.900(5) to mean any "article, object, document, record or other thing of physical substance." Proceedings protected include both criminal investigations and "official proceedings", a term defined at TD AS 11.56.900(4) to mean proceedings before governmental bodies and officials authorized to hear evidence under oath.

Subsection (1) of the proposed section is directed at intentional destruction, mutilation, alteration, concealment or removal of physical evidence that impairs its verity or availability in criminal investigation or official proceeding. Subsection (2) prohibits making, presenting or using physical evidence known to be false in an effort to mislead jurors or public servants engaged in official proceedings or criminal investigations. Subsection (3) prohibits the use of

force, deception, or threats to prevent the production of physical evidence in official proceedings and criminal investigations. In subsection (4), the proposed statute criminalizes conduct identical to that proscribed by subsections (1)-(3) but engaged in with the intent to prevent the institution of an official proceeding. Consistent with the Code's overall rejection of the defense of impossibility, TD AS 11.56.610 does not require that the physical evidence be admissible or material.

IV. TD AS 11.56.620. SIMULATING LEGAL PROCESS

A. Existing Law

Simulation of legal process is currently prohibited by AS 08.24.320 which provides that "[f]orms of demand or notice or other documents drawn to resemble court process may not be used by collection agencies in the collection of bills, accounts or other indebtedness." While AS 08.24.360 provides punishment by imprisonment for up to three months and/or a maximum fine of $500, application of the existing statute is limited to licensed collection agencies and person having managerial control of them.

B. The Code Provision

The Code provision is designed to protect the legitimacy of governmental administration and prevent the impairment of public confidence in genuine documents. Though aimed at discouraging use of misleading documents in the debt collection process, the section is not subject to the existing limitation

that the actor represent a collection agency. Under the Code provision any person who, with "intent to cause the recipient to take an action on it," issues a form that falsely simulates legal process acts in violation of the section. As in existing law, the offense applies both to civil and criminal process of any court. Subsection (a)(2) expands the coverage of subsection (a)(1) in nondebt situations to cover simulation of process of any court or official body, including those of other jurisdictions. Statutory authority of state agencies and other official bodies to issue subpoenas or other legal process is specifically recognized by subsection (a)(2).

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION.

ARTICLE 5. OBSTRUCTION OF PUBLIC ADMINISTRATION.

Section

Sec. 11.56.700. RESISTING OR INTERFERING WITH ARREST. (a) A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from effecting the arrest, he resists the arrest of himself or interferes with the arrest of another by

(1) using or threatening to use physical force;

(2) committing any degree of criminal mischief; or

(3) any means that creates a substantial risk of physical injury to any person.

(b) Resisting or interfering with arrest is a class B misdemeanor.

Sec. 11.56.720. REFUSING TO ASSIST A PEACE OFFICER OR JUDICIAL OFFICER. (a) A person commits the offense of refusing to assist a peace officer or judicial officer if, upon a request, command or order by a person he knows to be a peace officer or judicial officer, he unreasonably refuses or fails to make a good faith effort to assist that person in the exercise of his official duties.

(b) Refusing to assist a peace officer or judicial officer is a violation.

Sec. 11.56.730. REFUSING TO ASSIST IN AN EMERGENCY. (a) A person commits the crime of refusing to assist in an emergency if he unreasonably disobeys a request, command or order of a person he knows to be a member of a fire department or other public or private organization which deals with emergencies involving danger to life or property if that request, command or order relates to the safety of any person or protection of any property in the vicinity of an emergency.

(b) Refusing to assist in an emergency is a class B misdemeanor.

Sec. 11.56.740. CIVIL LIABILITY FOR EMERGENCY AID. (a) A person who, without expecting compensation, assists a person pursuant to sec. 720 or 730 of this chapter is not liable for civil damages as a result of an act or omission in rendering such aid.

(b) This section does not preclude liability for civil damages as a result of reckless, wilful, wanton or intentional misconduct.

Sec. 11.56.770. HINDERING PROSECUTION IN THE FIRST DEGREE. (a) A person commits the crime of hindering prosecution in the first degree if he renders assistance to a person who has committed a crime punishable as a felony, with reckless disregard that that person has engaged in the conduct constituting the crime, and with intent to

(1) hinder the apprehension, prosecution, conviction or punishment

of that person; or

(2) assist that person in profiting or benefiting from the commission of the crime.

(b) For purposes of this section, a person "renders assistance" to another if he

(1) harbors or conceals that person;

(2) warns that person of impending discovery or apprehension;

(3) provides or aids in providing that person with money, transportation, a deadly weapon, a dangerous instrument, a disguise or other means of avoiding discovery or apprehension;

(4) prevents or obstructs, by means of physical force, threat or deception, anyone from performing an act which might aid in the discovery or apprehension of that person;

(5) suppresses by an act of concealment, alteration or destruction physical evidence which might aid in the discovery or apprehension of that person; or

(6) aids that person in securing or protecting the proceeds of the crime.

(c) Hindering prosecution in the first degree is a class C felony.

Sec. 11.56.780. HINDERING PROSECUTION IN THE SECOND DEGREE. (a) A person commits the crime of hindering prosecution in the second degree if he renders assistance to a person who has committed a crime punishable more severely than a class B misdemeanor, with intent to

(1) hinder the apprehension, prosecution, conviction or punishment of that person; or

(2) assist that person in profiting or benefiting from the commission of the crime.

(b) For purposes of this section, a person "renders assistance" to another if he does any act described in sec. 770(b) of this chapter.

(c) Hindering prosecution in the second degree is a class B misdemeanor.

Sec. 11.56.790. COMPOUNDING. (a) A person commits the crime of compounding if, unless authorized by AS 12.45.120 or 12.45.130, he

(1) confers, offers to confer, or agrees to confer a benefit on another in consideration of that person's concealing an offense, refraining from initiating or aiding in the prosecution of an offense, or withholding evidence of an offense; or

(2) accepts or agrees to accept a benefit in consideration of his concealing an offense, refraining from initiating or aiding in the prosecution of an offense, or withholding evidence of an offense.

(b) Compounding is a class A misdemeanor.

Sec. 11.56.800. MAKING A FALSE REPORT. (a) A person commits the crime of making a false report if he knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime; or

(2) makes or causes to be made a false report to a peace officer, fireman, security officer or a public or private organization which deals with emergencies involving danger to life or property that a fire or other incident calling for an emergency response has occurred.

(b) Making a false report is a class A misdemeanor.

Sec. 11.56.810. MAKING A FALSE BOMB REPORT. (a) A person commits the crime of making a false bomb report if he knowingly makes or causes to be made a false report to any person that a bomb or other explosive or incendiary device is in a position to create a risk of harm.

(b) Making a false bomb report is a class C felony.

Sec. 11.56.820. TAMPERING WITH PUBLIC RECORDS. (a) A person commits the crime of tampering with public records if he knowingly

(1) makes a false entry in or falsely alters a public record; or

(2) destroys, mutilates, suppresses, conceals, removes or otherwise impairs the verity, legibility or availability of a public record, knowing that he lacks the authority to do so.

(b) Tampering with public records is a class A misdemeanor.

Sec. 11.56.830. IMPERSONATING A PUBLIC SERVANT. (a) A person commits the crime of impersonating a public servant if he falsely pretends to be a public servant and does any act in that capacity.

(b) It is not a defense to a prosecution under this section that

(1) the office the actor pretended to hold did not in fact exist; or

(2) the actor was in fact a public servant different than the one he falsely pretended to be.

(c) Impersonating a public servant is a class B misdemeanor.

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CHAPTER 56. Offenses Against Public Administration

ARTICLE 5. OBSTRUCTION OF PUBLIC ADMINISTRATION

COMMENTARY

I. TD AS 11.56.700. RESISTING OR INTERFERING WITH ARREST

A. Existing Law

AS 11.30.210 provides that it is a misdemeanor, punishable by a maximum $100 fine and/or 30 days in jail, for a person to "wilfully obstruct a peace officer in making, or attempting to make, a lawful arrest." There is no right to use physical force in resisting an unlawful, but otherwise peaceful, arrest. Miller v. State, 462 P.2d 421 (Alaska 1969); Gray v. State, 463 P.2d 897, 908 (Alaska 1970). See also Tentative Draft, Part 2, Commentary at 66.

B. The Code Provision

TD AS 11.56.700, a class B misdemeanor, prohibits a person from resisting the arrest of himself or interfering with the arrest of another by any of three methods. The person must know that a peace officer is making an arrest and act with the intent of preventing the officer from effecting an arrest.

Resisting or interfering with an arrest is usually manifested by physical force directed at the arresting officer. Subsection (a)(1) is therefore limited to resisting or interfering with an arrest by the use, or threatened use, of physical force. A person also violates TD AS 11.56.700 by resisting arrest or interfering with the arrest of another by

doing any act that produces a "substantial risk of physical injury," (i.e., fleeing in an automobile at high speeds through a residential area) or by committing any degree of criminal mischief (i.e., tampering with the officer's squad car). Mere non-submission to an arrest does not reach the level of resisting or interfering with arrest. As noted in the Commentary to the Hawaii Penal Code:

> One who runs away from an arresting officer or who makes an effort to shake off the officer's detaining arm might be said to obstruct the officer physically, but this type of evasion or minor scuffling is not unusual in an arrest, nor would it be desirable to make it a criminal offense to flee arrest. In this case the proper social course is to authorize police pursuit and use of reasonable force to effect the arrest. If the actor is captured, he may be convicted of the underlying offense. If conviction cannot be had, it would be a grave injustice to permit prosecution for an unsuccessful effort, by an innocent man, to evade the police.
>
> * * *
>
> Cases of interference which do not involve force or risk of bodily injury, but which present serious social dangers are included under [TD AS 11.56.770-.780] as cases of hindering prosecution.

HAW. REV. STAT. § 710-1026, Commentary at 251 (Special Pamphlet 1975)

II. TD AS 11.56.720. REFUSING TO ASSIST A PEACE OFFICER OR JUDICIAL OFFICER

A. Existing Law

At least four statutes in existing law require a citizen to aid a peace officer, judge or magistrate. AS 11.30.200 requires a person to assist a peace officer, judge or magistrate "in the execution of his office in the preservation of the peace, or the arrest of a person for a breach of the peace,

or the service of process." A person who "neglects or refuses to render assistance" commits a misdemeanor punishable by six months in jail or fine of $500.

AS 12.25.020 provides that a judge or magistrate may order any person to arrest another for a crime committed in the judge's or magistrate's presence, but does not provide a penalty for refusal, except as presumably applied pursuant to AS 11.30.200. A person who is commanded by two persons who are district judges, magistrates, peace officers, or chief executive officers of a city, town, village, or settlement to give aid during a riot and neglects to do so "is considered one of the rioters, and may be treated and punishable accordingly." AS 12.60.200

Finally, AS 18.65.100 recognizes that the Department of Public Safety and members of the State Troopers "may command the assistance of any able-bodied person to aid in accomplishing the purposes of §§ 20 - 110 of this chapter [police protection]."

B. The Code Provision

The Code replaces the scattered provisions in existing law with a single provision making it a violation to unreasonably refuse or fail to make a good faith effort to assist a peace officer, judge or magistrate in the exercise of his official duties. Though the Subcommission had not completed the final definition of the term "violation" at the time of the drafting of this part of the Tentative Draft, it is anticipated that a violation will be a noncriminal offense punishable by fine.

The Code provision requires that the citizen know that the person requesting assistance is a peace officer or judicial officer. Further, the citizen must unreasonably refuse to assist the officer. Thus, the Code provision does not authorize peace officers or judicial officers to foist unreasonably dangerous duties upon citizens. Neither does it authorize them to command citizens to aid them in the performance of their every day duties.

III. TD AS 11.56.730. REFUSING TO ASSIST IN AN EMERGENCY

The Code Provision

TD AS 11.56.730 is new to existing law. The statute provides that it is a B misdemeanor to refuse to obey a request, command or order of a person known "to be a member of a fire department or other public or private organization which deals with emergencies involving danger to life or property if that request, command or order relates to the safety of any person or protection of any property in the vicinity of an emergency." Note that, as with TD AS 11.56.720, the person must unreasonably disobey the order. A refusal to obey an order which exposes a person to a substantial risk of injury would not, for example, constitute a violation of the statute.

The statute upon which the proposed provivion is based, HAW. REV. STAT. § 710-1012, is limited to refusals to assist in fire control. TD AS 11.56.730 goes beyond the Hawaii statute by including not only that situation, but also the refusal to assist a member of any "public or private organization which deals with emergencies involving danger to life or property," a term broad enough to cover such groups

as emergency medical service technician teams, ambulance attendants and the national guard. Given the similarity and importance of the interests to be protected, there is no reason to distinguish assistance in fire control from assistance during other emergencies such as an avalanche or a flood. The Code provision also takes into account the special concerns involved in Alaska where "public" organizations may be too remote to render effective emergency aid.

IV. TD AS 11.56.740. CIVIL LIABILITY FOR EMERGENCY AID

This provision extends the "good samaritan" protections provided in AS 09.65.090 to situations where a citizen aids a person pursuant to TD AS 11.56.720 or .730. Not holding the citizen liable for ordinary negligence when he aids a person pursuant to either of the two preceeding statutes is both fair and necessary. As noted in the Commentary to the Hawaii Penal Code

> The waiver is fair in that it is hardly equitable to order a person to perform a useful act, on one hand, then expose him to the threat of civil liability, on the other. The waiver is necessary in that it would arguably be unreasonable to request such aid in many cases if all of the standards of civil liability were to apply. The person of whom aid is asked might, therefore, be able justifiably to refuse to give it.

HAW. REV. STAT. § 710-1012, Commentary at 242 (Special Pamphlet 1975)

V. TD AS 11.56.770, .780. HINDERING PROSECUTION IN THE FIRST AND SECOND DEGREES

A. Existing Law

While AS 12.15.010 has abolished the distinction between accessories before the fact and principals, the

distinction between accessories after the fact and principals still exists. Tarnef v. State, 512 P.2d 923, 928 (Alaska 1973). AS 12.15.020 provides that persons who "after the commission of any felony, conceal or aid the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment are accessories. There are no accessories in misdemeanors." AS 11.10.050 provides for one - five years imprisonment or $100 - $500 fine for an accessory after the fact.

B. The Code Provision

Conduct which would give rise to liability as an accessory after the fact under existing law is classified as the crime of hindering prosecution under the Revised Code. By creating two degrees of hindering prosecution, the Revised Code changes the punishment applicable to accessories after the fact. The particular degree of the offense of "hindering prosecution" is geared to the class of the underlying crime committed by the fugitive.

To commit either degree of hindering prosecution, the defendant must act with an "intent to hinder the apprehension, prosecution, conviction or punishment of another" or to assist a person "in profiting or benefiting from the commission of the crime." The first degree offense, TD AS 11.56.770, a class C felony, requires that a felony be committed by the person aided and that the defendant be at least reckless as to whether that person has engaged in conduct constituting a felony. Note that while the statute requires that the person aided

actually have committed a felony, there is no requirement that the defendant be aware of the legal classification of the conduct. It is not a defense, for example, that the defendant did not know that second degree assault constituted a felony so long as he was at least reckless as to whether the person he aided intentionally caused physical injury to another by means of a dangerous instrument, a form of second degree assault.

Hindering prosecution in the second degree would expand existing law by applying to the person who renders assistance to a person who has committed a class A misdemeanor. It should be noted that while the defendant is strictly liable regarding the nature of the criminal conduct, he must nevertheless have an "intent to hinder" prosecution. Commentary to the Model Penal Code notes that

> [TD AS 11.56.780] makes it an offense to aid misdemeanants as well as felons. This follows from our purpose to deter obstruction of justice. One can add to the difficulties of the police just as much where they are pursuing a misdemeanant as where they are after a felon. Furthermore, there are situations where the aider does not know what crime the putative offender may have committed, as where an unscrupulous surgeon agrees to change the appearance of a fugitive without caring to know the nature of his offense. In any event, it seems undesirable to introduce into prosecutions of this sort an issue of law (and defendant's knowledge thereof) as to the classification of the primary offense.

MODEL PENAL CODE § 208.32, Commentary at 196 (Tent. Draft 9, 1959)

Unlike existing law, the Code establishes the precise acts needed to commit either degree of hindering prosecution. The six methods set forth in TD AS 11.56.770(b) present a narrower concept of aid than in common law. This difference is discussed in the Commentary to the Model Penal Code.

> At common law the accessory after the fact was one who "receives, relieves, comforts, or assists" the felon.
>
> . . . .
>
> The issue of policy is whether to forbid specific kinds of aid or aid of any character whatsoever, That there may be need to limit the kinds of aid which will be made criminal appears when we consider the possible application of the Section to a person who merely refuses to answer police questions about the fugitive, or gives misleading answers, or advises the fugitive to flee, or counsels him as to likely refuges or the law of extradition, or supplies bail. Although assistance of this character would appear to fall within the ordinary meaning of the term "aid", used in may statutes, the courts have shown a reluctance to extend the law so far. . . . [On the theory] that the community does not desire prosecution in these situations, it would seem preferable not to use the comprehensive term "aid", but to specify the prohibited forms of aid, as [TD AS 11.56.770(b)] does.
>
> Among the activities specifically brought within the scope of [TD AS 11.56.770(b)], we list first the traditional offense of harboring or concealing the fugitive, which requires proof that he was hidden or secreted by the actor. Efforts to conceal the commission of the crime, or to alter, destroy, or hide evidence are and ought to be covered. Warning the principal of imminent discovery or apprehension is likewise an unequivocal intervention against law enforcement.
>
> One form of assistance to the putative offender that deserves special consideration is money. Providing a fugitive with funds is an act of equivocal significance. He may use it to escape or hide, to pay debts or go into business, or to support himself or his dependents, or to hire a lawyer [Subsection (3)] is intended to require proof that money was furnished not merely pursuant to a general desire to promote the offender's plan to remain at large, but specifically to facilitate escape efforts.

MODEL PENAL CODE § 208.32, Commentary at 198-200 (Tent. Draft No. 9, 1959).

VI TD AS 11.56.790. COMPOUNDING

A. Existing Law

The common law offense of compounding prohibited agreements for consideration to refrain from giving information to law enforcement authorities concerning a crime. Alaska has retained the offense of compounding in AS 11.30.190. The statute applies to compounding both misdemeanors and felonies. If the crime compounded is punishable by life imprisonment, the punishment for compounding is imprisonment for 1 - 5 years. The compounding of any other crime is punishable by 3 months - one year imprisonment or $50 - $500 fine.

The existing statute defines compounding as the acceptance of any "gift, gratuity, valuable consideration or other thing or a promise of one of them, or a promise to do or cause to be done an act beneficial" upon an "understanding or agreement, expressed or implied, to compound or conceal the crime, or not to prosecute or give evidence of it." The person who receives the consideration commits compounding; the person who pays the consideration does not.

The Code of Criminal Procedure provides that certain misdemeanors may be compromised, AS 12.45.120, pursuant to an order of the court, AS 12.45.130.

B. The Code Provision

The Revised Code expands existing law by providing that both the receiver and the giver of the consideration commit compounding, a class A misdemeanor. The Subcommission viewed

both parties as being equally culpable and decided that identical punishments should apply to each. The Code defines the prohibited consideration as a "benefit," a term defined and discussed in Tentative Draft, Part 2, Commentary at 87-89. The benefit must be offered or accepted in consideration for concealing the offense, refraining from initiating or aiding in the prosecution of the offense or withholding evidence of the offense.

Note that the Code provision specifically recognizes that existing law allows compromise of actions in certain situations. If the offer or acceptance of the benefit is made pursuant to these statutes, the participants have not committed compounding.

VII. TD AS 11.56.800, .810. MAKING A FALSE REPORT, MAKING A FALSE BOMB REPORT

A. Existing Law

Currently, AS 11.30.215 provides that a person who "wilfully and knowingly makes, or causes another to make, a false report of an alleged criminal offense to a peace officer or law-enforcement agency" commits the crime of "making a false report to a peace officer" punishable by imprisonment for not more than one year and/or a fine not exceeding $1,000.

False alarms to fire fighting authorities or ambulance service operators are prohibited in AS 11.45.050 which carries the same punishment as AS 11.30.215. A person who "makes a false report, with the intent to deceive, mislead or otherwise misinform a person concerning the placing,

planting or discharging of a bomb or other explosive or incendiary device" commits the crime of "false reports of bombing" carrying a one to five year sentence and/or a maximum $5,000 fine. AS 11.45.055.

B. The Code Provisions

Consistent with existing law, the Revised Code distinguishes between false reports in general and false bomb reports, providing more severe penalties for the latter. The making of a "false report" is a class A misdemeanor; the making of a "false bomb report" is a class C felony.

The crime of making a false report, TD AS 11.56.800, is based on existing AS 11.30.215 and AS 11.45.050. The proposed statute covers two types of false reports. Subsection (a)(1) covers the conduct of giving false information to a peace officer which the defendant knows to be false, with intent to implicate another in a crime. The Code provision limits the coverage of existing law by requiring that the defendant act with intent to implicate another in a crime. However, false reports to peace officers made with an intent to hinder the apprehension, prosecution, conviction or punishment of another are prohibited in the two degrees of hindering prosecution (see TD AS 11.56.770(b)(4) supra).

Subsection (a)(2) extends beyond the present "false alarms" statute in its application to fictitious reports of "other incidents calling for an emergency response" rather than solely false reports to firefighters or ambulance operators. This assures coverage of reports concerning

matters that may not be crimes in themselves, but are nevertheless within a proper area of investigation. A false report of a drowning, for example, results in the misapplication of crucial emergency services creating the risk that such services will be unavailable to respond to real emergencies. Such conduct is prohibited in the Revised Code.

Consistent with existing law, the Revised Code requires that the defendant know that his report is false. The Code also corresponds to existing law by requiring only that a fictitious report be given; no reliance is necessary. A person who knowingly makes a fictitious report can be assumed to intend to mislead the recipients in the performance of their duties.

TD AS 11.56.810, an aggravated form of making a false report, covers the situation where a person knowingly makes a false report that a bomb or similar device is in a position to create a risk of harm. Unlike the existing statute, there is no requirement that the person "intend to deceive, mislead or otherwise misinform a person." The making of a known false report will be sufficient to constitute a violation of the statute.

The phrases "or causes to be given" and "or causes to be made" are included in the proposed statutes to insure coverage when the defendant causes another to make the false report. For example, if Steve makes a false report that a bomb is placed in a department store to John, the manager of the store, who in turn notifies the police, Steve has

violated TD AS 11.56.810 since he has caused the making of the false report to the police.

VIII. TD AS 11.56.820. TAMPERING WITH PUBLIC RECORDS

A. Existing Law

At least five statutes in existing law prohibit various forms of altering, destroying, concealing, making false entries in or suppressing the availability of public records. The statutes differ as to what types of documents are protected, the manner in which the tampering occurs, the person doing the act, the culpable mental state required, and the sentences authorized.

"Mishandling of public records," AS 11.30.240, prohibits a person from wilfully destroying, secreting or mutilating a public record, book, paper or writing. The statute also prohibits a person from wrongfully taking any of the same items from the person having legal custody of them, as well as punishing a person who wrongfully obtains possession and refuses or neglects to return the document when lawfully required or demanded to do so. Punishment is set at imprisonment from 90 days to one year. AS 11.30.245, "Obstruction of access to public records," prohibits the intentional obstruction of inspection of a public record subject to inspection pursuant to AS 09.25.110 or 09.25.120. Punishment for a first offense is by fine of $100 - $500. Second and subsequent violations may result in a one to six month sentence of imprisonment and/or $250 - $1,000 fine.

AS 11.30.250, "Act of officer having custody" prohibits an officer having custody of a "record, map or book, or a paper or proceeding of a court, filed or deposited in a public office or placed in his hands for any purpose" from "stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting" the document or permitting another person to do so. Punishment is set at one - five years imprisonment and/or a $5,000 fine. If AS 11.30.250 is violated by a person other than an "officer having custody," AS 11.30.260 sets punishment at one - three years imprisonment and/or a $2,000 fine. AS 11.30.280 prohibits false statements in a certificate or writing knowingly made by a public officer authorized to make or give the certificate or writing. Punishment is set at one - two years imprisonment and/or a maximum $5,000 fine.

B. The Code Provision

The crime of tampering with public records, a class A misdemeanor, is intended to penalize conduct which undermines confidence in the accuracy of public records, confidence that is essential to efficient public administration. The central purpose of the proposed statute is not the protection of potential victims of altered public records. Consequently, TD AS 11.56.280 does not require that the tampering be made with an intent to defraud as do the sections on forgery (see TD AS 11.46.500 - .580) and falsification of business records (TD AS 11.46.630). Further, there is no requirement that the information in the public record be made under oath or sworn to, as required

by the sections on perjury and related offenses. See TD AS 11.56.200-.240, Perjury and Related Offenses. The offenses of forgery and perjury do, however, complement the crime of tampering with public records when the aggravating circumstances are present.

Key to the statute is the definition of public record appearing in TD AS 11.56.900(6). The definition is taken from SSHB 531, the Proposed Alaska Freedom of Information Act. The definition is broad enough to cover any article "regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by an agency . . . because of the information value in it."

Two categories of conduct are prohibited. Subsection (a)(1) covers false entries or the false altering of a public record. Subsection (a)(2) covers the problem of access to public records. Included in this category are acts of destruction and mutilation as well as the suppression or concealment of a public record. This subsection is broad enough to cover the situation where a public servant prevents access to public records, conduct now described in AS 11.30.245.

Both subsections require that the defendant act knowingly. Under subsection (a)(1) he must know he is making a false entry or alteration. Under subsection (a)(2) he must destroy, mutilate or conceal documents, knowing that he has no legal authority to do so.

IX. TD AS 11.56.830. IMPERSONATING A PUBLIC SERVANT

A. Existing Law

AS 11.30.220 provides that a person who "falsely assumes to be a judge, magistrate or peace officer, and acts as such, and requires a person to aid or assist him in any matter pertaining to the duty of a judge, magistrate or peace officer" commits the crime of "impersonating a peace officer," punishable by three months to one year imprisonment or $50 - $500 fine.

B. The Code Provision

The Code expands the existing statute by prohibiting the impersonation of any public servant (a term defined and discussed in Tentative Draft, Part 2, Commentary at 87, 92-93), not merely peace officers. Impersonating a public servant is classified as a B misdemeanor. The defendant must falsely pretend to be a public servant and, as under the existing provision, must do an act in that capacity. Note that subsection (b)(2) specifically excludes as a defense that the defendant was a public servant if he falsely represents himself to be another public servant.

The existing requirement that the impersonator require another to aid or assist him is not retained in the Revised Code. Thus, the Code insures coverage in situations where no specific aid is requested, but the defendant has acted improperly. For example, a person who falsely pretends to be a housing inspector and obtains entrance to an apartment has

violated the statute. The requirement that an act be performed in the capacity of the public servant insures that innocent impersonations, such as wearing a judge's robes to a costume ball, are not covered by the statute.

Subsection (b)(1) rejects any possible defense based upon nonexistence of the office the impersonator pretended to hold.

The Code does not retain the existing statute, AS 11.20.500, which prohibits the unauthorized use of a badge or emblem of certain societies, e.g., Spanish war veterans and Greek letter fraternities. If the wearing of the emblem is coupled with intent to commit theft or other fraudulent practices, chapter 41 of the Revised Code will adequately cover such conduct. Use of an emblem to obtain unauthorized admission to a private club would, for example, constitute theft of services, TD AS 11.46.200.

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION.

ARTICLE 6. GENERAL PROVISIONS.

Sec. 11.56.900. DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "improperly influence a witness" means to cause or induce a witness to

(A) testify falsely, offer misleading testimony, or withhold testimony in an official proceeding;

(B) avoid or attempt to avoid legal process summoning him to testify in an official proceeding, regardless of whether legal process has issued;

(C) absent himself from an official proceeding to which he has been summoned; or

(D) engage in conduct described in sec. 610 of this chapter;

(2) "judicial officer" means a supreme court justice, including the chief justice, a judge of the superior court, a district court judge, or a magistrate;

(3) "juror" means a person who is a member of an impanelled jury or a person who has been drawn or summoned to attend as a prospective juror;

(4) "official proceeding" means a proceeding heard before a legislative, judicial, administrative or other governmental body or official authorized to hear evidence under oath;

(5) "physical evidence" means an article, object, document, record, or other thing of physical substance;

(6) "public record" means a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official

business and preserved or appropriate for preservation by an agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the organization, function, policies, decisions, procedures, operations or other activities of the state or municipality or because of the informational value in it; it also includes staff manuals and instructions to staff that affect the public;

(7) "testimony" means oral or written statements, documents or other material that may be offered by a witness in an official proceeding;

(8) "witness" means

(A) a witness summoned or appearing in an official proceeding or

(B) a person whom the defendant believes may be called as a witness in an official proceeding, present or future.

CHAPTER 66. OFFENSES AGAINST PUBLIC HEALTH AND DECENCY.

ARTICLE 1. PROSTITUTION AND RELATED OFFENSES.

SECTION

Sec. 11.66.100. PROSTITUTION. (a) A person commits the crime of prostitution if he

(1) engages or agrees to engage in sexual conduct for hire; or

(2) hires a person to engage in sexual conduct.

(b) Prostitution is a class B misdemeanor.

Sec. 11.66.110. SOLICITATION FOR PURPOSES OF PROSTITUTION. (a) A person commits the crime of solicitation for purposes of prostitution if he solicits another person to engage in an act of prostitution.

(b) Solicitation for purposes of prostitution is a class A misdemeanor.

Sec. 11.66.120. PROMOTING PROSTITUTION IN THE FIRST DEGREE. (a) A person commits the crime of promoting prostitution in the first degree if, with intent to promote prostitution,

(1) he owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise;

(2) he, other than as a person being compensated for personally rendered sexual conduct for hire or his patron, induces or causes a person to engage in prostitution or to remain in a place of prostitution;

(3) he receives or agrees to receive money or other property, other than as a person being compensated for personally rendered sexual conduct for hire, pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) he engages in conduct that institutes, aids or facilitates a prostitution enterprise.

(b) Promoting prostitution in the first degree is a class C felony.

Sec. 11.66.130. PROMOTING PROSTITUTION IN THE SECOND DEGREE. (a) A person commits the crime of promoting prostitution in the second degree if he engages in conduct, other than as a person being compensated for personally rendered sexual conduct for hire or his patron, that aids or facilitates an act of prostitution.

(b) Promoting prostitution in the second degree is a class B misdemeanor.

Sec. 11.66.140. COMPELLING PROSTITUTION IN THE FIRST DEGREE. (a) A person commits the crime of compelling prostitution in the first degree if he

(1) uses or threatens to use physical force on anyone with intent to induce or cause a person to engage in prostitution;

(2) induces or causes a person less than 16 years of age to engage in sexual conduct for hire; or

(3) induces or causes a person in his legal custody to engage in prostitution.

(b) Compelling prostitution in the first degree is a class B felony.

Sec. 11.66.150. COMPELLING PROSTITUTION IN THE SECOND DEGREE. (a) A person commits the crime of compelling prostitution in the second degree if he induces or causes a person at least 16 years of age but less than 19 years of age to engage in sexual conduct for hire.

(b) Compelling prostitution in the second degree is a class C felony.

Sec. 11.66.160. EVIDENCE REQUIRED FOR SECS. 120 - 150 OF THIS CHAPTER.

In a prosecution under secs. 120 - 150 of this chapter it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

Sec. 11.66.170. SPOUSE AS WITNESS. In a prosecution under secs. 120 - 150 of this chapter spouses are competent and compellable witnesses for or against either party.

Sec. 11.66.180. DEFINITIONS. As used in secs. 110 - 170 of this chapter, unless the context requires otherwise,

(1) "place of prostitution" means any place where sexual conduct is engaged in for hire;

(2) "prostitution enterprise" means an arrangement in which two or more persons are organized to render sexual conduct for hire;

(3) "sexual conduct" means genital or anal intercourse, cunnilingus, fellatio or masturbation of one person by another person.

ALASKA REVISED CRIMINAL CODE

Chapter 66 - Offenses Against Health and Decency

ARTICLE 1. PROSTITUTION AND RELATED OFFENSES

COMMENTARY

The Effect of the Revised Code provisions on the Existing Law of Prostitution and Related Offenses

In defining the crimes of prostitution, solicitation for purposes of prostitution, promoting prostitution and compelling prostitution, the Prostitution and Related Offenses Article:

1. Establishes six substantive offenses, thus consolidating the twenty-four archaic statutes in existing law and redefining offenses such as keeping a bawdyhouse in modern terminology.
2. Defines prostitution as sex neutral conduct, thus overcoming probable constitutional problems in the existing definition of the offense.
3. Specifically lists the types of sexual acts associated with prostitution, effectively broadening the range of conduct covered by the article.
4. Creates two degrees of promoting prostitution, one a felony and one a misdemeanor, distinguished by the defendant's intent and the circumstances surrounding his conduct.
5. Creates two degrees of compelling prostitution, both

felonies, distinguished by the existence of force, the relationship between defendant and the victim, and the age of the victim.

6. Eliminates the corroboration requirement of AS 12.45.040, as interpreted in Johnson v. State, 501 P.2d 762 (Alaska 1972), to permit conviction of a defendant on the basis of uncorroborated testimony of a person whose prostitution was compelled or promoted.

A closely divided Subcommission voted to continue the application of criminal sanctions to the single act of prostitution not conducted in the context of organized activity.

In support of decriminalization, a number of the members of the Subcommission were of the opinion that any statute prohibiting private consensual sexual activity between adults might be subject to constitutional attack in light of the Alaska Supreme Court's holding in Ravin v. State, 537 P.2d 494, 504 (Alaska 1975), that ". . . citizens of the State of Alaska have a basic right to privacy in their houses under Alaska's Constitution." On two occasions - Harris v. State, 457 P.2d 638 (Alaska 1969) and Anderson v. State, 567 P.2d 351 (Alaska 1977) - the Court has suggested that the right to privacy might protect certain sexual practices engaged in by consenting adults in private.

Additionally, those in favor of decriminalization of the act of prostitution expressed the view that (1) the

conduct involved was of such a nature that the continued imposition of criminal penalties would not likely result in any real deterrence; (2) that placing the prostitute outside the law might encourage involvement in other criminal activities; (3) that prostitution had persisted throughout the ages despite the best efforts of society to suppress it; and (4) that the scarce resources of the criminal justice system could be better used in dealing with offenses which were more harmful to society.

Those members of the Subcommission who favored continuation of criminal penalties for the single act of prostitution expressed the opinion that (1) many members of society still viewed the act as a crime; (2) that there were a variety of "spin-off" offenses of a more serious nature which stemmed from prostitution and that those offenses could be better controlled through the continued imposition of criminal sanctions for prostitution; and (3) that legalization of the single act when coupled with the continued criminalization of related offenses would create a situation fraught with inconsistency and present serious problems in the enforcement of laws governing conduct related to prostitution.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.66.180. DEFINITIONS

Three terms are defined to provide clarity throughout the sections dealing with prohibited prostitution activity.

It should be noted that the term "person" is not defined in the prostitution and related offenses article. Instead, it is defined with the other general definitions which apply throughout the Revised Code. That definition includes all natural persons. Consequently, the offenses defined in this article are "sexless" ones and may be committed by a male or female acting as either a prostitute or patron. The use of masculine pronouns throughout the article is merely for drafting convenience and is not intended in any way to detract from the Revised Code's sex-neutral approach to prostitution and related offenses.

A. Subsection (1). Place of Prostitution.

The use of this term is designed to insure that criminal sanctions can be applied to individuals who use physical locations other than houses or apartments, such as boats, trailers or vans, for prostitution activities. The activity, not its location, will be the determining factor in whether the provisions of the article are to be applied.

B. Subsection (2). Prostitution Enterprise.

This term has been used to permit appropriate penalty distinctions to be made between the socially harmful conduct related to the promotion of prostitution as a business and a variety of less serious and frequently innocuous conduct which merely facilitates prostitution. The drafted definition is designed to reach, for example, agreements between a prostitute and a pimp, between two prostitutes, or larger scale activities. By the use of the term "organized", however, it

is not intended to reach a transaction involving a prostitute and a patron.

C. Subsection (3). Sexual Conduct.

This term is used to insure that prostitution is not limited to heterosexual genital intercourse, which, arguably, is the only sexual conduct covered by the existing AS 11.40.210. By broadening the range of conduct covered by the provisions of the article, the definition takes into account the realities of commerce in sexual services. Additionally, the term, as defined, is designed to complement the sex-neutral definition of prostitution contained in the Revised Code.

II. TD AS 11.66.100. PROSTITUTION

This section describes the underlying offense of this chapter and makes it a class B misdemeanor. It covers a broader scope of consensual commercial sexual activity than existing law, recognizing that sexual intercourse, alone, is not the only form of service provided by prostitutes and that the activity may be either heterosexual or homosexual in nature.

The commercial character of the prohibited conduct is fixed by the use of the term "for hire". As with existing law, cash consideration is not required.

As drafted, the section covers the activities of both the prostitute and the patron. The offense may be

committed by either engaging or agreeing to engage in sexual conduct for hire (the prostitute), or by hiring a person to engage in sexual conduct (the patron).

III. TD AS 11.66.110. SOLICITATION FOR PURPOSES OF PROSTITUTION

This section makes it a class A misdemeanor to solicit a person to engage in prostitution. It is designed primarily to deal with street solicitations, a form of conduct the Subcommission deemed particularly annoying to the public. However, as drafted, it covers any solicitation for purposes of prostitution made in any place, public or private.

IV. TD AS 11.66.120. PROMOTING PROSTITUTION IN THE FIRST DEGREE.

This section imposes class C felony penalties on the more serious business aspects of prostitution. In so doing, it combines in a single statute fourteen existing statutory provisions. As drafted, it is designed to prohibit such conduct as the running of a house of prostitution or pimping.

The conduct prohibited in this section must be engaged in with the specific intent to promote prostitution. The section is not intended to cover, for example, the innocent landlord who unintentionally or unknowingly rents to prostitutes. Further, even if a landlord knowingly rents to a prostitute, he could not be held liable unless he acted with the intent to promote prostitution.

Paragraph (1) covers both fixed situs and "call girl" types of prostitution activity. Paragraph (2) is aimed at the panderer or pimp. It is not intended, however, to cover a prostitute who induces a patron to remain in a place of prostitution for purposes of engaging in an act of sexual conduct. However, it would cover the prostitute who caused or induced a person other than a patron to engage in prostitution. Paragraph (3) is directed at the person who knowingly derives a profit from prostitution. It is somewhat more restrictive than traditional "living off the earnings" statutes. Prostitution statutes have been unique in attaching criminal liability to one who is supported by the illegal income of another, and there seems to be little justification for continuing such a legislative policy. Such statutes have the effect of prohibiting a person engaged in prostitution from establishing a "normal" social relationship with an unemployed individual.

Paragraph (4) is intended to reach conduct which enables prostitution activities to occur such as the procuring of either prostitutes or their patrons or the transportation of prostitutes. It bears repeating that the conduct must be engaged in with the intent to promote prostitution. This paragraph would not reach the conduct of a cab driver who drove a person to a place of prostitution not knowing it to be such; or, knowing it to be such but not acting with the intent to promote prostitution.

Neither paragraph (4) nor paragraph (2), is intended to reach the conduct of a patron who hires two prostitutes at once. Such an individual would be covered by the provisions of TD AS 11.66.110 if the conduct merely involved a solicitation, or by the provisions of TD AS 11.66.110 if the conduct involved the hiring of prostitutes to engage in sexual conduct.

V. TD AS 11.66.130. PROMOTING PROSTITUTION IN THE SECOND DEGREE

The primary distinction between this section and TD AS 11.66.120(a)(4) is that this section is limited to facilitation of a single "act" of prostitution while the first degree provision applies to intentional acts promoting prostitution enterprise. Further, a specific promotional intent is not required for violation of the second degree provision. A hotel employee who steers a guest at the hotel to a prostitute in return for the expectation of a larger "tip" when the guest checks out has committed promoting prostitution in the second degree. The hotel employee may have no formal relationship with the prostitute and may not receive any compensation from the prostitute for his activities. A cab driver who engages in similar conduct with respect to a "fare" for essentially the same reasons as the hotel employee is also covered. Because culpability is not specified, the general rules regarding culpability are applicable. The defendant must knowingly engage in conduct and be at least reckless as to whether his conduct is facilitating prostitution. See Tentative Draft,

Part 2, Commentary at 21.

VI. TD AS 11.66.140. COMPELLING PROSTITUTION IN THE FIRST DEGREE

This section, a class B felony, is designed to deal with coercive aspects that may be involved in prostitution.

Paragraph (a)(1) is designed to impose liability in the case of physical coercion to cause someone to engage in prostitution.

Paragraph (a)(2) is intended to insure that, regardless of consent, the young receive the protection from society that their age, social and intellectual development demands. At the time of the drafting of this commentary the Subcommission was considering, but had reached no decision, on whether to permit reasonable mistake of age as an affirmative defense to this section.

Paragraph (a)(3) is designed to reach individuals who may induce children, foster children, incompetents, or others in their legal custody to engage in prostitution.

VII. TD AS 11.66.150. COMPELLING PROSTITUTION IN THE SECOND DEGREE

The intent of this section is essentially the same as that underlying TD AS 11.66.140. Here, however, lesser penalties are provided in cases in which the person who is induced or caused to engage in prostitution is at least 16,

but less than 19 years of age. The Subcommission is also considering whether to provide for the application of the affirmative defense or reasonable mistake of age to this section.

VIII. TD AS 11.66.160. EVIDENCE REQUIRED FOR SECTIONS .120 - .150 OF THIS CHAPTER

This section will reverse the effect of AS 12.45.040, as interpreted by the Alaska Supreme Court in Johnson v. State, 501 P.2d 762 (Alaska 1972). The existing statute requires corroboration of the testimony of a prostitute to insure that alleged "victims" were not motivated by blackmail, malice or abnormal psychological conditions. As drafted, TD AS 11.66.160 is consistent with the proposed provisions of the Code related to corroboration in perjury cases (see TD AS 11.56.220, Tentative Draft, Part 2, at 95) and to existing corroboration requirements in rape cases.

IX. TD AS 11.66.170. SPOUSE AS WITNESS

This section recodifies provisions of existing law found in AS 11.40.130 and is designed to insure that traditional evidentiary privileges will not forestall prosecution in appropriate cases.

CHAPTER 66. OFFENSES AGAINST PUBLIC HEALTH AND DECENCY.

ARTICLE 2. GAMBLING OFFENSES.

Section

Sec. 11.66.200. GAMBLING. (a) A person commits the offense of gambling if he engages in unlawful gambling.

(b) It is an affirmative defense to a prosecution under this section that the defendant was a player in a social game.

(c) Gambling is a violation for the first offense. Gambling is a class B misdemeanor for the second and each subsequent offense.

Sec. 11.66.210. PROMOTING GAMBLING IN THE FIRST DEGREE. (a) A person commits the crime of promoting gambling in the first degree if he promotes or profits from an unlawful gambling enterprise.

(b) Promoting gambling in the first degree is a class C felony.

Sec. 11.66.220. PROMOTING GAMBLING IN THE SECOND DEGREE. (a) A person commits the crime of promoting gambling in the second degree if he promotes or profits from unlawful gambling.

(b) Promoting gambling in the second degree is a class A misdemeanor.

Sec. 11.66.230. POSSESSION OF GAMBLING RECORDS IN THE FIRST DEGREE. (a) A person commits the crime of possession of gambling records in the first degree if, with knowledge of its contents or

character, he possesses a writing or paper of a kind commonly used in the operation or promotion of an unlawful gambling enterprise.

(b) Possession of gambling records in the first degree is a class C felony.

Sec. 11.66.240. POSSESSION OF GAMBLING RECORDS IN THE SECOND DEGREE. (a) A person commits the crime of possession of gambling records in the second degree if, with knowledge of its contents or character, he possesses a writing or paper of a kind commonly used in the operation or promotion of unlawful gambling.

(b) Possession of gambling records in the second degree is a class A misdemeanor.

Sec. 11.66.250. AFFIRMATIVE DEFENSES APPLICABLE TO SECS. 230 AND 240. (a) It is an affirmative defense in a prosecution under sec. 230 of this chapter that the writing or paper is possessed by the defendant solely as a player.

(b) It is an affirmative defense in a prosecution under sec. 230 or 240 of this chapter that the writing or paper

(1) is not used or intended to be used by the defendant in the operation or promotion of unlawful gambling;

(2) is used or intended to be used by the defendant in a social game.

Sec. 11.66.260. POSSESSION OF A GAMBLING DEVICE. (a) A person commits the offense of possession of a gambling device if, with knowledge of the character of the device, he manufactures, sells, transports places or possesses, or conducts or negotiates a transaction affecting or designed to affect ownership, custody or use of

(1) a gambling device other than a slot machine, with reckless disregard that the device is to be used in promoting unlawful gambling; or

(2) a slot machine.

(b) It is an affirmative defense in a prosecution under (a)(1) of this section that the gambling device possessed by the defendant is used or intended to be used only in a social game.

(c) Possession of a gambling device is a violation.

Sec. 11.66.270. DEFINITIONS. As used in secs. 200 - 270 of this chapter, unless the context requires otherwise,

(1) "contest of chance" means a contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor;

(2) "gambling" means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome; "gambling" does not include

(A) bona fide business transactions valid under the law of contracts for the purchase or sale at a future date of securities or commodities and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; or

(B) playing an amusement device that

(i) confers only an immediate right of replay not exchangeable for something of value other than the privilege of immediate replay; and

(ii) does not contain a method or device by which the privilege of immediate replay may be cancelled or revoked;

(3) "gambling device" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of

unlawful gambling, whether it consists of gambling between persons or gambling by a person involving the playing of a machine; "gambling device" does not include

(A) lottery tickets, policy slips, or other items used in the playing phases of lottery or policy schemes; or

(B) an amusement device as described in (2)(B) of this section;

(4) "gambling enterprise" means a gambling business which

(A) includes five or more persons who conduct, finance, manage, supervise, direct, or own all or part of the business; and

(B) has been or remains in substantially continuous operation for a period in excess of 30 days or has a gross income of $2,000 or more in any single day;

(5) "player" means a person who engages in gambling solely as a contestant or bettor, believing that the risk of losing and the chances of winning are the same for all participants except for the advantages of skill and luck, without receiving or becoming entitled to receive any profit from gambling other than personal gambling winnings and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity, except that, for purposes of this definition, a person who gambles at a social game on equal terms with the other participants does not "otherwise render material assistance" to the establishment, conduct or operation by performing, without fee or remuneration, acts directed towards the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises for the game, or supplying cards or other equipment used in the game; "player" does not include a person who promotes gambling by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon

the outcomes of future contingent events;

(6) "profits from gambling" means that a person, acting other than as a player, accepts or receives money or other property under an agreement or understanding with another person by which he participates or is to participate in the proceeds of gambling;

(7) "promoting gambling" means that a person, acting other than as a player, engages in conduct that materially aids any form of gambling; conduct of this nature includes but is not limited to

(A) conduct directed toward the

(i) creation or establishment of the particular gambling activity or acquisition or maintenance of premises, paraphernalia, equipment or apparatus used in the gambling;

(ii) conduct of the playing phases of gambling; or

(iii) arrangement of the financial or recording phase of gambling or toward any other phase of its operation; or

(B) having control or right of control over premises that are used with the defendant's knowledge for purposes of gambling and permitting the gambling to occur or continue without making an effort to prevent its occurrence or continuation;

(8) "slot machine" means a gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value or otherwise entitle the player to something of value; a device so constructed or readily adaptable or convertible to such use is a slot machine even though

(A) it is not in working order;

(B) some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability; or

(C) apart from its use or adaptability as a slot machine it may also sell or deliver something of value on some basis other than chance;

(9) "social game" means gambling in a home where no house player, house bank, or house odds exist and where there is no house income from the operation of the game;

(10) "something of value" means any money or property; any token, object or article exchangeable for money or property; and any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest in money or property or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge;

(11) "unlawful" means not specifically authorized by law.

ALASKA REVISED CRIMINAL CODE

CHAPTER 66 - Offenses Against Public Health and Decency

ARTICLE 2. GAMBLING OFFENSES

COMMENTARY

Article 2 of Chapter 66 of the Revised Code adopts a comprehensive pattern of gambling legislation similar to that proposed in Michigan and enacted in New York (N.Y. PENAL LAW, Art. 225), Hawaii (HAW. REV. STAT. §§ 71-1220 to 1231) and Oregon (OR. REV. STAT. §§ 167.117-162). The article initiates a comprehensive revision of Alaska's gambling laws. For the most part the coverage of existing law has been preserved although emphasis has been changed in several instances. The Code changes existing law in two significant ways.

1. The Code excludes from the prohibitions of the criminal law the "friendly poker game" by recognizing an affirmative defense to gambling that the defendant engaged in gambling solely as a contestant or bettor in a home where no house income, other than personal winnings, resulted from the game.

2. The Code focuses on organized crime by creating a felony offense of promoting gambling which applies to the person who promotes or profits from an unlawful gambling enterprise. The term "gambling enterprise" is defined as a gambling business involving at least five persons which remains in substantially continuous operation for a period in excess of 30 days or has gross income of $2000 or more in any day.

I. Existing Law

"The essential elements of gambling are price, chance and prize. Thus, one gambles when he pays a price for a chance to obtain a prize." State v. Pinball Machines, 404 P.2d 923, 925 (Alaska 1965). Six statutes in existing law prohibit activity associated with gambling.

The primary gambling offense is AS 11.60.140, "Dealing or conducting a gambling game." The statute provides that it is a misdemeanor for a person to deal, play, carry on, open or cause to be open, or conduct a game of "faro, monte, roulette...poker...or other game...whether played for money... or other representative value." As the statute extends to "playing," the prohibition covers the person who merely participates in a friendly poker game at his own house. Gambling is punishable by "a fine of not more then $500 and by imprisonment in a jail until the fine and costs are paid. A person so convicted is punishable one day for every $2 of the fine and costs. The imprisonment shall not exceed one year." Insofar as the statute makes jail time dependent on ability to pay a fine, the penalty for gambling is unconstitutional. See, Hood v. Snedly, 498 P.2d 120 (Alaska 1972).

AS 11.60.170 provides penalties of 30 days to six months imprisonment and/or a $100 - $500 fine for a person who "maintains, aids or abets, or is associated in maintaining" a place where gaming or gambling activities are carried on.

Such places are also declared to be nuisances and may be enjoined. AS 11.60.180. Gambling implements used in violation of the statutes may be seized and destroyed. AS 11.45.040. See One Cocktail Glass v. State, No. 1437 (Alaska, June 8, 1977).

Misdemeanor penalties are provided for promoting or setting up lotteries, AS 11.60.010 (imprisonment for 6 months - 1 year in penitentiary or 3 months - 1 year in jail or $100 - $1000 fine); selling tickets or shares in a lottery, AS 11.60.020 (imprisonment for 3 months - 1 year or $50 - $500 fine); advertising lottery tickets, AS 11.60.030 (1 - 6 months or $20 - $200 fine); and selling fictitious lottery tickets, AS 11.60.040 (1 - 3 years imprisonment).

II. The Code Provisions

1. TD AS 11.66.270(2). Definition of "Gambling"

The definition of "gambling" is key to the comprehensive treatment of gambling offenses in the Revised Code. The Code definition is based on that set forth in State v. Pinball Machines, 404 P.2d 923, 925 (Alaska 1965) noted supra. In the Code, "'gambling' means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome." The terms "contest of chance" and "something of value" are defined in TD AS 11.66.270(1) and (10).

The definition of gambling includes any activity that brings a profit based on chance and includes ordinary lotteries. After broadly describing gambling, it is unnecessary to list gambling games by name as is done in the existing statutes. See AS 11.60.140. Games of pure skill, i.e., chess, will not be considered gambling if the contestants bet against each other. Placing a side bet on a game of chess, however, would be gambling because, from the onlooker's perspective, the outcome depends on "chance" as he has no control over the outcome.

The exceptions to the definition of "gambling" in subsection (A) are necessary to exclude stock, commodity, and insurance transactions from the scope of the gambling definition. The exception in subsection (B) excludes from the definition of "gambling" playing a pinball machine that is able to "pay-off" only in free games. The provision changes existing law under which such machines have been held to be gambling implements subject to seizure. Pinball Machines v. State, 371 P.2d 805 (Alaska 1962); State v. Pinball Machines, 404 P.2d 932 (Alaska 1965). Note, however, that any pinball machine that contains any method or device (commonly referred to as a "knock-off" button) whereby free games may be cancelled or revoked does not come under the exception. A machine that has such a device indicates the strong likelihood that "free games" are being exchanged for some other form of consideration.

2. TD AS 11.66.270(1). Definition of "Contest of Chance"

In Morrow v. State, 511 P.2d 127 (Alaska 1973) the court considered the issue of whether a "football card" is a lottery. The court adopted the "dominant factor" approach by holding that a "scheme constitutes a lottery where chance dominates the distribution of prizes even though such a distribution is affected to some degree by the exercise of skill or judgment." The Code follows the approach taken by other revised codes, [see, e.g., N.Y. PENAL LAW § 225.00(1); OR. REV. STAT. § 167.117(1)] in postulating a similar definition, but not adopting the "dominant factor" test.

In many instances it will be virtually impossible to prove or determine whether chance or skill dominates. "It should be sufficient that, despite the importance of skill in any given game, the outcome depends in a material degree upon an element of chance." N.Y. PENAL LAW § 225.00, Commentary at 23 (McKinney 1967).

3. TD AS 11.66.200. Gambling

Subject to the "social game" affirmative defense, the Code prohibits all forms of "unlawful gambling." A first gambling offense is classified as a violation (a non-criminal offense). Second and subsequent convictions, however, are punishable as B misdemeanors. The definition of "unlawful" (TD AS 11.66.270(11)) recognizes that no gambling practice is lawful unless it is expressly authorized by statute. See generally, AS 05.15 (Bingo, Raffles and Ice

Pools). With regard to gambling authorized pursuant to Title 5, the Subcommission considered the necessity of revising the gambling provisions of that Title from the perspective of the criminal sanction. Legislative recommendations and a discussion of reasons for the proposals are found in Appendix II to this Tentative Draft.

The affirmative defense in subsection (b) (which the defendant must raise and establish by a preponderance of the evidence) exempts "friendly games" and "friendly bets" from the coverage of TD AS 11.66.200. The defense requires that the defendant first establish that he is a player. "Player" is defined in TD AS 11.66.270(5). That definition requires that the person engage in gambling solely as a contestant or bettor without receiving any profit from the gambling other than his winnings and without rendering material assistance to the gambling. Conduct directed toward the establishment of a social game is specifically excluded from the definition of "material assistance."

The equal risk and chance provision in the definition of "player" does not refer to the advantage enjoyed by a skilled player; it excludes the affirmative defense to those who cheat at otherwise social games.

The affirmative defense also requires that the player establish that he participated in a "social game." That term is defined in TD AS 11.66.270(9) as "gambling in a home where no house player, house bank or house odds exist and where there is no house income from the operation of the game."

If the house or banker has an advantage because of the way the game is conducted, the affirmative defense is denied to all participants since a social game requires that no "house player, house bank or house odds exist." For example, consider the case where Pat invites a few friends over to his house to play blackjack. If Pat remains the dealer throughout the game and, according to the rules of the game, wins in all instances of ties, house odds exist. The chances of winning are not the same for all participants. All participants have committed gambling since they have not met the requirements of the affirmative defense.

Thus, under the Code, gambling in a home when no house income or house odds exist is not subject to criminal penalties. If the gambling occurs elsewhere, for example, in a park or in a bar, the affirmative defense is denied even though no house income or odds exist.

4. TD AS 11.66.210 - .220. Promoting Gambling in the First and Second Degree

Sections 210 and 220 of the article provide broad coverage of all forms of gambling exploitation. In doing so, these sections change existing law by providing felony penalties for the promoting of or profiting from large scale gambling enterprises. Both "profits from gambling" and "promoting gambling" are defined to exclude coverage of one who merely participates in gambling. Such a person, subject to the affirmative defense of "social games," is covered by TD AS 11.66.200, Gambling.

TD AS 11.66.220 provides that it is a class A misdemeanor to engage in either of two forms of gambling activity. The first is "promoting" unlawful gambling. This term is defined in TD AS 11.66.270(7) to include any activity that goes beyond being a player, including setting up the game, acquisition of the necessary equipment, bringing in the players, and financing the operation. Again, note that one who merely arranges for a social game is a "player" and does not fall within the coverage of either degree of promoting gambling.

The second activity prohibited is "profiting" from unlawful gambling. This term is defined in TD AS 11.66.270(6) and covers the receipt by persons other than players of money or other property as proceeds from gambling activity based on a prior agreement or understanding to that effect.

TD AS 11.66.210 provides class C felony penalties for promoting or profiting from an unlawful gambling enterprise. The term "unlawful gambling enterprise" is defined in TD AS 11.66.270 and is taken directly from the federal gambling statute. 18 U.S.C. § 1955. A "gambling enterprise" is defined as a gambling business which includes five or more persons "who conduct, finance, manage, supervise, direct, or own all or part of such business." Additionally, it must be established that the gambling business "has been or remains in substantially continuous operation for a period in excess of 30 days or has a gross income of $2,000 or more in any single day."

The definition is broad enough to extend to a business which operates in more than one premise. Because the definition of "gambling enterprise" is taken directly from federal law, it is expected that federal decisions interpreting 18 U.S.C. § 1955 will be highly relevant in the interpretation of the Code provisions.

5. TD AS 11.66.230 - .240. Possession of Gambling Records in the First and Second Degree

TD AS 11.66.230 and .240 prohibit the possession of any writing or paper of a kind commonly used in the operation or promotion of unlawful gambling. Both proposed statutes require that the defendant possess the writing or paper with knowledge of its contents or character. Playing cards are not gambling records; they are covered by TD AS 11.66.350 discussed infra.

Division of the possession of gambling records offense into two degrees parallels the Code's treatment of the crime of promoting gambling by distinguishing between large and small scale operators. If the paper or writing is of a kind commonly used in the operation of an unlawful gambling enterprise (i.e., records reflecting the operation of a large scale gambling business) the possessor has committed the first degree offense, a class C felony. Possession of other gambling records is a class A misdemeanor.

In TD AS 11.66.250, the Code recognizes three affirmative defenses to the possession offenses. The first defense, applicable only to the first degree crime, is set

out in TD AS 11.66.250(a). Under subsection (a), a defendant who is able to establish by a preponderance of evidence that he holds "gambling records" merely in his capacity as a player cannot be convicted of the first degree offense. Subsection (a) is intended to preclude felony convictions in cases where the defendant is in possession of football cards or other tokens evidencing his own participation as a player in a gambling enterprise. Note that the affirmative defense applies only in a prosecution for the first degree offense; player status is no defense to prosecution under the second degree statute.

The two remaining affirmative defenses contained in TD AS 11.66.250(b) apply to both degrees of possession of gambling records. Subsection (b)(1) allows a defense when the defendant is able to establish that the paper or writing is not intended to be used in operation or promotion of unlawful gambling. Subsection (b)(2) recognizes as an affirmative defense that the writing or paper is "used or intended to be used by the defendant in a social game" despite the fact that even "social games" are, by definition, unlawful gambling. Thus, the person who engages in a social game, as defined in TD AS 11.66.270(9), will not be penalized for keeping score sheets or other writings or papers commonly used during such games.

6. TD AS 11.66.260. Possession of a Gambling Device

This section prohibits the unlawful possession of gambling devices and the possession of all slot machines.

Possession of a gambling device is a violation. (The device or slot machine will also be subject to forfeiture pursuant to an additional section of the gambling article to be completed by the Subcommission at the December 10, 1977 meeting.) The term "gambling device," is defined in TD AS 11.66.270(3) as "any device, machine, paraphernalia or equipment that is used or usable in the playing phases of unlawful gambling," other than lottery tickets or policy slips (possession of which is punishable as possession of gambling records, TD AS 11.66.230, 240). The definition of gambling device also specifically excludes pinball machines that only "pay off" in free games. Possession of slot machines, defined in TD AS 11.66.270(8), is prohibited in subsection (a)(2).

The conduct prohibited by the statute includes the manufacture, sale, transporting, and possession of any gambling device or slot machine, or the conducting or negotiating of any transaction affecting or designed to affect ownership, custody or use of such items. When a gambling device other than a slot machine is involved, the prosecution must establish that the defendant acted with reckless disregard as to whether the device was to be used in the promotion of unlawful gambling. This culpable mental state requirement insures that a prima facie case of possession of a gambling device cannot rest on proof that the defendant possessed such otherwise innocuous items as chips or a deck of playing cards, which would otherwise be covered because of the broad definition of a gambling device. Note, however, that possession of slot machines is prohibited without regard to the culpability of the defendant.

APPENDIX I

ALASKA REVISED CRIMINAL CODE

Chapters 31, 46 (Articles 3 and 5), 56 (Articles 3, 4, 5 and 6) and 66 (Articles 1 and 2)

DERIVATIONS

CHAPTER 31 - ATTEMPT AND RELATED OFFENSES

The Code's provisions on conspiracy are based on ORS 161.450-.485.

In applying conspiracy to a limited number of crimes the Code follows the approach adopted in OHIO REV. CODE ANN. § 2923.01.

TD AS 11.31.120(d) is based on PROPOSED FEDERAL CRIMINAL CODE, STUDY DRAFT § 1004(6) (1970).

TD AS 11.31.140(e) is based on MO REV. STAT. § 564.016 (effective Jan. 1, 1979).

CHAPTER 46 - OFFENSES AGAINST PROPERTY

ARTICLE 3 - ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES

TD AS 11.46.480 - Criminal Mischief in the First Degree

Subsection (a)(1) is based on HAW. REV. STAT. § 708-826.

Subsection (a)(2) is based on HAW. REV. STAT. § 708-821(a).

Subsection (a)(3) is based on AS 11.20.517(a).

TD AS 11.46.482 - Criminal Mischief in the Second Degree

Subsection (a)(1) is based on HAW. REV. STAT. § 708-821(b).

Subsection (a)(2) is based on AS 11.20.517(b).

Subsection (a)(3) is based on HAW. REV. STAT. § 708.822(a).

TD AS 11.46.484 - Criminal Mischief in the Third Degree

This section is based on HAW. REV. STAT. § 708-822(b).

TD AS 11.46.486 - Criminal Mischief in the Fourth Degree

Subsection (a)(1) is based on HAW. REV. STAT. § 708-827 and AS 11.20.515.

Subsection (a)(2) is based on ORS 164.354(b).

Subsection (a)(3) is based on HAW. REV. STAT. § 708-823.

TD AS 11.46.490 - Definitions

Subsection (1) is based on AS 11.20.635(d)(1).

Subsection (2) is based on HAW. REV. STAT. § 708-825(1).

Subsection (3) is based on HAW. REV. STAT. § 708-825(2).

Subsection (4) is based on HAW. REV. STAT. § 708-800(21).

ARTICLE 5 - BUSINESS AND COMMERCIAL OFFENSES

TD AS 11.46.600-.610 - Scheme to Defraud

The two degrees of scheme to defraud are based on N.Y. PENAL LAW §§ 190.60-.65 and 18 U.S.C. § 1341.

TD AS 11.46.620 - Misapplication of Property

This section is based on ORS § 165.095.

TD AS 11.46.630 - Falsifying Business Records

This section is based on HAW. REV. STAT. § 708-872.

TD AS 11.46.660-.670 - Commercial Bribe Receiving; Commercial Bribery

This section is based on HAW. REV. STAT. § 708-880.

TD AS 11.46.680 - Engaging in a Business Unlawfully

This section is based on PROPOSED MICH. CRIM. CODE § 4230 (1967).

TD AS 11.46.685-.700 - Criminal Usury; Possession of Usurious Loan Records

These sections are based on N.Y. PENAL LAW §§ 190.40-.45.

CHAPTER 56 - OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 3 - ESCAPE AND RELATED OFFENSES

TD AS 11.56.300-.350 - Escape and Unlawful Evasion

These statutes are based on AS 11.30.090-.095.

TD AS 11.56.360 - Attempting to Aid an Escape

This section is based on MO. REV. STAT. § 575.230 (effective January 1, 1979).

TD AS 11.56.370 - Criminally Negligently Permitting Escape

This section is based on AS 11.30.120.

TD AS 11.56.380 - Promoting Contraband

This section is based on AS 33.30.055.

ARTICLE 4 - OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

TD AS 11.56.510, .530 - Influencing a Witness; Receiving a Bribe by a Witness

These sections are based on HAW. REV. STAT. §§ 710-1070, 1071.

TD AS 11.56.540 - Tampering with a Witness

This section is based on HAW. REV. STAT. § 710-1072.

TD AS 11.56.550, .580 - Influencing a Juror; Receiving a Bribe by a Juror

These sections are based on HAW. REV. STAT. §§ 710-1073, 1074.

TD AS 11.56.590 - Jury Tampering

This section is based on HAW. REV. STAT. § 710-1075.

TD AS 11.56.600, .605 - Misconduct by a Juror; Receiving Unauthorized Communications by a Juror

This section is based on ARIZ. REV. STAT. § 13-2808 (effective Oct 1, 1978).

TD AS 11.56.610 - Tampering with Physical Evidence

This section is based on MO. REV. STAT. § 575.100 (effective Jan 1, 1979).

TD AS 11.56.620 - Simulating Legal Process

This section is based on MO. REV. STAT. § 575.130 (effective Jan 1, 1979).

ARTICLE 5 - OBSTRUCTION OF PUBLIC ADMINISTRATION

TD AS 11.56.700 - Resisting or Interfering with Arrest

This section is based on HAW. REV. STAT. § 710-1026.

TD AS 11.56.720 - Refusing to Assist a Peace Officer or Judicial Officer

This section is based on HAW. REV. STAT. § 710-1011 and AS 11.36.720.

TD AS 11.56.730 - Refusing to Assist in an Emergency

This section is based on HAW. REV. STAT. § 710-1012.

TD AS 11.56.740 - Civil Liability for Emergency Aid

This section is based on HAW. REV. STAT § 710-1011(3) and AS 09.65.090.

TD AS 11.56.770-.780 - Hindering Prosecution

These sections are based on HAW. REV. STAT. §§ 710-1028, 1029, 1030.

TD AS 11.56.790 - Compounding

This section is based on MO. REV. STAT. § 575.020 (effective Jan 1, 1979).

TD AS 11.56.800 - Making a False Report

This section is based on MO. REV. STAT. § 575.080 (effective Jan 1, 1979).

TD AS 11.56.810 - Making a False Bomb Report

This section is based on MO. REV. STAT. § 575.090 (effective Jan 1, 1979).

TD AS 11.56.830 - Impersonating a Public Servant

This section is based on MO. REV. STAT. § 575.120 (effective Jan 1, 1979).

CHAPTER 66 - OFFENSES AGAINST PUBLIC HEALTH AND DECENCY

ARTICLE 1 - PROSTITUTION AND RELATED OFFENSES

TD AS 11.66.100 - Prostitution

This section is based on ORS 167.007.

TD AS 11.66.110 - Solicitation For Purposes of Prostitution

This section is based on ARK. STAT. ANN. § 41-3003(1)(b).

TD AS 11.66.120; .130 - Promoting Prostitution

These sections are based on ORS 167.012.

TD AS 11.66.140; .150 - Compelling Prostitution

These sections are based on ORS 167.017.

TD AS 11.66.160 - Evidence Required

This section is based on TD AS 11.56.220.

TD AS 11.66.170 - Spouse as Witness

This section is based on ORS 167.027(2).

TD AS 11.66.180 - Definitions

The definitions are based on ORS 167.002(1); 167.002(3); 167.002(4).

ARTICLE 2 - GAMBLING OFFENSES

The Code's article on gambling is based on HAW. REV. STAT §§ 71-1220 to 1231.

The definition of "gambling enterprise", TD AS 11.66.270(4) is taken from 18 U.S.C. § 1955.

APPENDIX II

AMENDMENTS TO AUTHORIZED GAMBLING STATUTES

in TITLE 5

Additions in underlines
Deletions in [CAPITAL BRACKETS]

Sec. 1. AS 05.15.010 is amended to read:

AS 05.15.010 ADMINISTRATION OF [DEPARTMENT OF REVENUE TO ADMINISTER] CHAPTER. The Department of Revenue shall administer this chapter. The Department of Public Safety shall investigate offenses under this chapter.

Sec. 2. AS 05.15.060 is amended to read:

AS 05.15.060 RULES AND REGULATIONS. In accordance with the Administrative Procedures Act (AS 44.62), the commissioner of revenue shall adopt [,NO LATER THAN SEPTEMBER 7, 1960,] rules and regulations necessary to carry out this chapter covering, but not limited to

(1) the issuance, renewal, suspension and revocation of permits including the grounds therefor;

(2) a method of ascertaining net proceeds, the determination of items of expense which may be incurred or paid, limitations on the ratio of authorized expenses to proceeds and the limitation of the amount of the items of expense to prevent the proceeds from the activity permitted from being diverted to noncharitable, noneducational, nonreligious, or profit-making organizations, individuals or groups;

(3) . . . .

Sec. 3. AS 05.15.070 is amended to read:

AS 05.15.070. EXAMINATION OF [COMMISSIONER OF REVENUE MAY EXAMINE] PERMITTEES. (a) The Commissioner may examine or have examined the books and records of a permittee. The Commissioner may require the permittee to pay the reasonable cost of the examination. The Commissioner may issue subpoenas for the attendance of witnesses and the production of books, records, and other documents.

(b) For the purpose of investigating violations of this chapter, of regulations issued under it or of Title 11, the department of public safety may, at all reasonable times, have free access to the places where the records of activities licensed under this chapter are kept or where conduct authorized by this chapter is carried on and may inspect the books and records, devices, tickets, cards and papers used in the activity.

Sec. 4. AS 05.15.200 is amended to read:

AS 05.15.200. PENALTIES [PENALTY]. (a) An activity performed in accordance with the regulations of the department and under a license duly issued pursuant to this chapter constitutes an exception to the prohibitions established under AS 11.66. Conduct authorized by this chapter but which is conducted without a valid license issued by the department or in a manner constituting an intentional violation of the regulations of the department is subject to the penalties provided under AS 11.66 to the full extent that the offenses

established in that chapter apply.

(b) A person, not being authorized to do so under sec. 150 of this chapter, who knowingly shares in the net proceeds of an activity licensed under this chapter commits the crime of theft and is punishable as provided in AS 11.46.130-150.

(c) Every permittee and every officer, agent or employee of the permittee and every other person or corporation who intentionally [WILFULLY] violates or who procures, aids or abets in the intentional [WILFUL] violation of this chapter or a regulation made under this chapter is guilty of a class B misdemeanor.

(d) A person who violates this chapter or a regulation made under this chapter or who knowingly fails or refuses to obey a valid order or request for inspection under sec. 70 of this chapter is guilty of a violation.

AMENDMENTS TO AUTHORIZED GAMBLING

STATUTES IN TITLE 5

Commentary

The prohibition of gambling activity contained in TD AS 11.66 relates closely to the licensing and regulation of similar conduct under Title 5. In reviewing the application of Title 11 to gambling activities, certain complementary improvements and clarifications in Title 5 are required to improve the administration and enforcement of prohibitions supported by criminal sanction.

Section 1. The principal problem with the existing statutory arrangement is confusion regarding responsibility for investigations of violations of law. The Department of Public Safety is the agency otherwise normally given this duty throughout government. The establishment of authority in the Department of Revenue to administer the licensing, regulatory and rule making provisions of the chapter should not obscure the duty of the Department of Public Safety to investigate matters which, because carried on outside the privileged area, are basically criminal in nature.

Section 2. The reference to September 7, 1960, in AS 05.15.060 is stricken as an anachronism.

The addition of a reference to "grounds" for issuance, renewal, suspension and revocation of permits was added to make clear the authority of the commissioner to define, by

regulation, substantive offenses for which licensing penalties could be imposed. The current statute, AS 05.15.060, leaves open for argument whether the power to issue regulations on these subjects applies only to the procedure under which these actions may be taken. It will be necessary, under the amended statutes, for the commissioner to make distinctions between more and less serious offenses, infractions and regulation noncompliances so that these licensing penalties can be applied with more precise discretion.

"Suspension" has been added to AS 05.15.060(1) since suspensions are otherwise provided for in the chapter, but no guidance is given to the commissioner regarding a substantive scheme which justifies their use.

A provision has also been added that will require the commissioner to publish regulations relating to limitations on the ratio of "authorized expenses" to "proceeds", terms defined in AS 05.15.160 and AS 05.15.210(13). The justification of allowing AS 05.15.100 to create an exception to the broad prohibition of gambling found in Title 11 is that the proceeds from these tightly regulated gambling activities go to specified public uses. A principal abuse of this type of program occurs when the game becomes more important than the objective served. Payroll for employees of the game and others who benefit from "authorized expenses" (which does not include prizes) may become important enough that indirect beneficiaries become a controlling factor and "proceeds" beneficiaries the forgotten objective of the game.

The language added to subsection (2) of AS 05.15.060 gives the commissioner the authority to check this abuse by prescribing standards setting a minimum net, stated as a percentage of operating costs, to be allocated to the beneficial use. Since the costs may vary according to the kind of game, its size and location, it appears preferable to let the commissioner determine specific allowable limits after hearing under the administrative process.

Section 3. This section in its existing form is a major contributing factor to the confusion regarding the role of the Department of Revenue in the law enforcement business with respect to violations of the gambling laws. While the authority of the Commissioner of Revenue to examine books, etc., as appropriate to his revenue raising and licensing authority is not disturbed, a subsection has been added allowing the Department of Public Safety to look at books, records, devices and papers.

Customary provisions granting subpoena power have not been vested in the Commissioner of Public Safety; otherwise, the provision is a foreshortened version of the authority usually granted state agencies to examine books of financial institutions, (see, e.g., AS 06.20.160, granting Department of Commerce right to inspect books of small loan companies), to inspect amusement devices, sanitation facilities and other business aspects involving a high level of public interest.

It should be noted that Title 5 does not provide criminal penalties for refusal to allow such an inspection; refusal is

treated as a violation, a noncriminal offense, under AS 05.15.200(d). Under an appropriate regulation, such a refusal could be the basis of a license action. When more serious criminal activity is involved, a search warrant may be procured. Note also that some violations of Title 5 may constitute theft. See AS 05.15.200(b).

The provision for access to places and records is likely to have a beneficial effect, apart from preventing violations of the act, in encouraging operator honesty with the public in the management of licensed activities.

Section 4. Subsection 4(a) has been added to emphasize that legally conducted activities licensed under Title 5 are a specific exception to the gambling prohibitions contained in the Code and that in the absence of a legally conducted licensed activity, gambling prohibitions of Title 11 apply. This provision makes explicit what is now provided in an attorney general's opinion regarding the exceptional nature of AS 05.15. See 1960 Op. Att'y Gen., No. 8 (Alaska, 1960).

Subsection 4(b) is intended to make "skimming" a form of theft. There is some question now whether skimming condoned by management authority can be treated more severely (except as tax evasion where unreported) than license violations. This provision treats skimming as a form of theft similar to theft from trust funds. If the amount skimmed exceeds

$500, such conduct would be punishable under TD AS 11.46.130, theft in the first degree, as a class C felony.

Subsection 4(c) parallels the existing penalty section of the chapter and adds violation of regulations as a class B misdemeanor. The culpable mental state of "intentionally" replaces "wilfully" to comply with Code nomenclature.

Subsection 4(d) was added to provide additional sanction for violations of the act or regulations under it that are not intentional. It also adds teeth to departmental orders that do not have the full effect of regulations and provides this most limited sanction for unreasonably denying inspection of premises and records.

Under its grant of authority to regulate, the Commissioner of Revenue will also have the authority to categorize conduct of this type as an additional ground for sanction by way of licensing action.